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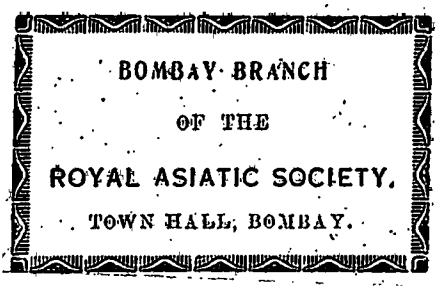

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Wrongs and their Remedies.

BEING

A TREATISE

ON

THE LAW OF TORTS.

78573

BY

C. G. ADDISON, Esq.

OF THE INNER TEMPLE, BARRISTER-AT-LAW,
AUTHOR OF "THE LAW OF CONTRACTS."

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PREFACE TO THE SECOND EDITION.

THE Author hastens to apologise for the delay that has taken place in the publication of the Second Edition of the present treatise, which has now been out of print for two years. This delay has been occasioned by an earnest desire to improve the work, and render it worthy of the favourable reception it has met with. Several new chapters have been added, and others have been considerably enlarged. Much useful information concerning the redress of injuries derived from cases in equity, not noticed in the First Edition, will now be found interspersed with the original materials at appropriate places throughout the work.

The various authorities, too, both at law and in equity, respecting the remedy by injunction, have now been introduced at the close of the early chapters of the work, and also in the chapter before the last; and many hundreds of new cases, qualifying and explaining, or overruling previous decisions, or authoritatively establishing certain principles of law, for which no decided case previously existed, have been examined, collated, and added to the numerous cases previously cited. The book has also been revised throughout, and all recent decisions illustrative of the subject-matter of the present volume have, it is believed, received their due share of attention.

It is hoped, therefore, that the present Treatise will be found to be a considerable improvement upon its predecessor.

Inner Temple,
March, 1864.

EXTRACT FROM THE PREFACE TO THE FIRST EDITION.

To those readers who are unacquainted with English law terms it may be desirable to explain, that the word TORT, handed down to us from our Norman jurists, is used in our law at the present day to denote a civil wrong, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanour, which is punished by the criminal law in the interests of society at large. Every invasion of a legal right, such as the right of property, or the rights incident to the possession of property, or the right of personal security, constitutes a Tort; and so does every neglect of a legal duty, and every injury to the person, or character, or reputation of another.

The Law of Torts, or civil wrongs, therefore, having for its object the protection of our property, and the security of our persons and reputation, is a branch of law of general interest and importance, and there are few persons of any property or station in the country to whom some knowledge of it does not become essential at some time or another, either for the purpose of maintaining themselves in their just rights, or for the purpose of ascertaining the nature and extent of their legal duties and responsibilities.

Torts, it has truly been observed, are infinitely various, and it would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. It is not intended to treat herein of all civil wrongs of every sort and description, but of such wrongs and injuries to property, to the person, and to reputation, as constantly occur in the ordinary intercourse of mankind, and daily occupy the attention of the lawyer: such as wrongful infringements of the rights and privileges incident to the ownership and possession, and use and enjoyment, of landed property; nuisances and injuries arising from the negligent use and management of such property; injuries to lands and tenements from waste, negligence, and fire; injuries from trespasses and unlawful entry on land, in disturbance of the possessory and proprietary rights of occupiers and landlords; wrongful seizure and conversion of

chattels; injuries from the negligent use and management of chattels, and the negligent performance of work; injuries from negligence and breach of duty on the part of bailees, common carriers, and common innkeepers; wrongful distress and sale of things distrained; assault and battery, and wrongful imprisonment; malicious arrest, malicious prosecution, and malicious abuse of legal process; trespasses and injuries committed in the execution of void or irregular legal process, or in the execution of warrants and orders of justices; injuries resulting from the exercise, or intended exercise, of statutory powers and authorities; injuries from libel and slander; fraudulent misrepresentation and deceit; fraudulent concealment, breach of warranty and false pretences; matrimonial and parental injuries; adultery and seduction. But for a detailed summary of the subjects treated of in the present work, the reader is referred to the annexed table of contents.

At the close of the volume are some chapters on parties to actions *ex delicto*, on the pleadings, defences, and evidence in such actions, and the damages recoverable therein.

It is remarkable that the laws which regulate and control the conduct of mankind in the private relations of life, and define and ascertain their proprietary and personal rights, should form no part of ordinary education or learning; but they have hitherto been so blended with our artificial system of forms of action, and burthened with so many niceties and subtleties peculiar to our ancient technical and refined system of legal procedure and pleading, that the study of them has been rendered tedious, and repulsive to all who do not intend to take to the law as a profession. Now, however, that forms of actions have been substantially abolished, and the abstrusities of our venerable and refined system of pleading and procedure have given way to a more liberal and enlightened system, the pathway to legal science and to the general attainment of a certain amount of useful legal knowledge has been rendered comparatively easy and inviting.

In the following treatise the Author has endeavoured to present to the reader an accurate view of the present state of the law on the subjects treated of, without burthening his mind with technical legal learning which is now obsolete, or unnecessarily perplexing his judgment with contradictory and conflicting decisions; and it is hoped that the task has been faithfully and carefully accomplished.

Inner Temple,
June, 1860.

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THE LAW OF TORTS.

CHAPTER I.

THE LAW OF TORTS.

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SECTION I.

OF ACTIONABLE WRONGS, AND INJURIES THAT ARE NOT ACTIONABLE.

Of the conjunction of damage and wrong necessary to create a Tort.—To constitute a TORT, two things must concur, actual or legal

damage to the plaintiff, and a wrongful act committed by the defendant (*a*).

Ex damno sine injuriâ non oritur actio—is a very ancient rule or maxim of the common law. "There must," observes Hobart, C. J., "be a damage either already fallen upon the party or inevitable; there must also be a thing done amiss" (*b*). "By *injuria*," observes Willes, C. J., "is meant a tortious act; it need not be wilful and malicious, for though it be accidental, an action will lie (*c*).

Damage and wrong—Dangerous things set in motion.—If the damage done is the immediate result of force exercised by the defendant, in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happen accidentally, or by misfortune, (*d*) unless the force was used strictly in self-defence. Thus, where one shooting at butts for a trial of skill with the bow and arrow, accidentally wounded a man, it was holden that he was responsible in damages, though he was doing an act lawful in itself, and had no unlawful purpose in view (*e*). And the same was holden where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms (*f*).

"If I put in motion a dangerous thing, as, if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in an action of trespass" (*g*). "If I turn suddenly round and knock a man down without intending it, I am responsible for the injury I do him" (*h*).

Damage without wrong.—A man may, however, sustain grievous damage at the hands of another; and yet, if it be the result of inevitable accident or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages. An act of force, for example, done in necessary self-defence, causing injury to an innocent by-stander, is *damnum sine injuriâ*, "for no man does wrong, or contracts guilt in defending himself against an aggressor" (*i*). Thus, if a lighted firework is thrown into a coach full of company, and is flung out again in necessary self-defence, and falls against and burns a bystander, or explodes in his face and blinds him, the person throwing out the firework is not answerable for the damage, as his act was inevitable, and he has done no wrong (*j*). The wrong-doer is the party who originally threw the burning material

(*a*) Bayley, J., *Rex.* v. *Pagham Com.*, &c., 8 B. & C. 362.
(*b*) *Waterer* v. *Freeman*, Hob. 266.
(*c*) *Winsmore* v. *Greenbank*, Willes, 577.
(*d*) *Dickenson* v. *Watson*, 2 Jones, 205.
(*e*) 21 Hen. 7, 28 a.
(*f*) *Weaver* v. *Ward*, Hob. 134; post, ch. 8, s. 1.
(*g*) Ld. Ellenborough, *Leame* v. *Bray*, 3 East, 595.
(*h*) Lawrence, J., ib. 596; post, ch. 8, s. 1.
(*i*) De Grey, C. J., 3 Wils. 412.
(*k*) Gould, J., 2 W. Bl. 898.

into the coach ; and as against him there is that conjunction of damage and wrong which constitute a tort, and will support an action (*l*).

If a landowner whose land is exposed to inroads of the sea, or to inundation from the overflowing of an adjoining creek or river, erects sea-walls, groins, or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbour and wash it away, or cover it with water, the landowner so causing an injury to his neighbour is not responsible in damages to the latter, as he has done no wrong, having acted in self-defence, and having a right to protect his land and his crops from inundation (*m*). But if he runs out a wharf or embankment into the stream for the mere purpose of acquiring additional land, and improving the value of his property, and encroaches upon the waterway of a navigable river, and thereby gives a new direction to the current, and causes his neighbour's land to be washed away, he commits a tort or wrong, and is responsible for all its injurious consequences ; for " if an individual, for his own benefit, makes an improvement on his own land, and thereby unwittingly injures his neighbour, he is answerable " (*n*).

If a man sells a house commanding a fine sea view, or a lovely prospect, and then builds on his own adjoining land, so as to shut out the sea view or the prospect, and thereby greatly diminishes the marketable value of the house he has just sold, a great damage is done to the purchaser thereof ; but there is no tort or wrong, as the vendor has done nothing which restrains him from interfering with his neighbour's prospect (*o*).

The simple sale of horses diseased with glanders, or of horned cattle infected with the lung disease, or sheep infected with the scab, has been held not to be unlawful (although exposing them for sale in a public market is prohibited) (*p*) ; and therefore, if a man buys horses, cattle, or sheep so infected, and mixes them with his own flocks and herds, and sustains grievous damage from the spread of the disease, he has no remedy ; although the vendor knew at the time of the sale that the animals had the disease upon them, and the purchaser was wholly ignorant of it. The maxim of caveat emptor has been applied to such a case ; and the purchaser, it is said, ought to have had a warranty (*q*). The damage, however, resulting from the spread of infectious and contagious disorders amongst sheep and cattle is so serious, that every vendor who sells an animal, knowing it to be labouring under a highly contagious or infectious disorder, ought to be held responsible for fraudulent con-

(*l*) *Scott* v. *Shepherd*, 2 W. Bl. 892.
(*m*) *Rex* v. *Commissioners, &c. Pagham*, 8 B. & C. 360.
(*n*) Gibbs, C. J., 6 Taunt. 44 ; post, ch. 4.
(*o*) *Aldred's* case, 9 Co. 58 b. *Knowles* v. *Richardson*, 5 Mod. 55. *Att.-Gen.* v. *Doughty*, 2 Ves. senr. 453.
(*p*) 16 & 17 Vict. c. 62, s. 1.
(*q*) *Hill* v. *Balls*, 2 H. & N. 302.

cealment, if he fails to disclose the fact at the time he makes the bargain (*r*).

Wrong without damage.—There may, on the other hand, be a wrong done to another, but if it has not caused what the law terms actual legal damage to the plaintiff, there is no tort in respect of which an action is maintainable. Thus, in cases of slander by word of mouth, where the words do not convey any imputation of an indictable offence, there is no cause of action in respect of them unless the injured party has sustained some pecuniary loss, or has been deprived of some gainful occupation and employment, or has been injured in his trade, occupation, or profession, or means of livelihood, or has lost a marriage by reason of the slander (*s*). An imputation, for example, by words, however gross, and on an occasion however public, upon the chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special temporal damage to her (*t*); neither is it actionable to call a man a swindler or a cheat, a blackguard or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander (*u*).

If instructions for an action are given, and through the mistake of the attorney a wrong person is sued, and the latter fails to appear and plead, and judgment goes against him by default and he is imprisoned, or his goods are seized in execution, this is "damnum absque injuriâ," and no action is maintainable. If he defends the action and incurs costs which he cannot recover, he is in no better situation (*x*).

Damage too remote to give rise to a cause of action.—If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or "concatenated as cause and effect to support an action" (*y*). Thus, a defendant has been held to be not liable either for the wrongful act of a third party, or the arbitrary choice of a fourth party, detrimental to the plantiff, but not proximately caused by the defendant's wrong (*z*).

Where the manager of a theatre brought an action against the defendant for a libel on an opera-singer, who had been engaged by him to sing at his theatre, and who had been deterred from singing by reason of the publication of the libel, whereby the plaintiff lost the benefit of her services, it was held that the damage was too remote, and was not

(*r*) Post, Fraud & Falsehood. *Blakemore* v. *Brist & Ex. Rail. Co.*, 8 Ell. & Bl. 1051. *Anderson* v. *Buckton*, 1 Str. 192.

(*s*) Post, ch. 17, s. 2.

(*t*) Ld. Wensleydale, *Lynch* v. *Knight*, 8 Jur., N. S. (H. L.) 724. *Wilby* v. *Elston*, 8 C. B. 142.

(*u*) *Savile* v. *Jardine*, *Hopwood* v. *Thorn*, *Barnett* v. *Allen*, post, ch. 17, s. 2.

(*x*) Rolfe, B., *Davies* v. *Jenkins*, 11 M. & W. 755.

(*y*) Ld. Campbell, *Gerhard* v. *Bates*, 2 Ell. & Bl. 490.

(*z*) *Vicars* v. *Wilcox*, post, ch. 17.

recoverable by the plaintiff, for the opera-singer was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill-treat her (*a*).

If the wrong would not have been followed by the damage, if other circumstances had not intervened, for which circumstances the defendant is not responsible, the damage is not the proximate result of the wrong, and is not sufficiently "concatenated" therewith (*b*). Thus, in actions for slander, where a defendant is proved to have uttered slanderous words in respect of the plaintiff, not imputing to him any indictable offence, and creating a cause of action only in case the utterance of the slander has caused actual legal damage to the plaintiff, and no such damage has accrued to the plaintiff directly from the utterance of the words, and they would have failed to produce any injurious consequences to the plaintiff if they had not been repeated by another person, the injury resulting from the intervention of that other person cannot be visited upon the defendant (*c*).

Damage, though remote, sufficiently connected with the wrong.—The general rule of law, however, is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts, causing the damage, were the necessary or legal and natural consequence of the original wrongful act. Thus, where the defendant threw a lighted squib into the market-house, in a market-place, during a fair, and the squib fell upon a ginger-bread stall, and the stall-keeper, to protect himself and his wares, threw the squib across the market-house, where it fell upon another stall, and was again thrown off and exploded near the plaintiff's eye and blinded him, it was held that the original thrower was responsible in damages for the injury sustained by the plaintiff, through the intervening agency of the others. "All the injury," observes De Grey, C. J., "was done by the first act of the defendant. That, and all the intervening acts of throwing, must be considered as one single act. It is the same as if a cracker had been flung, which had bounded and rebounded again and again before it had struck out the plaintiff's eye" (*d*). So, where the defendant, having had a quarrel with a boy in the street, took up a pickaxe, and pursued the boy, and the latter ran for safety into a wine-shop and upset a cask of wine, it was held that the defendant, the pursuer of the boy, was responsible in damages

(*a*) *Ashley* v. *Harrison*, 1 Esp. 49.

(*b*) *Hoey* v. *Felton*, 11 C. B., N. S. 146; 31 Law J., C. P. 105; post, p. 16.

(*c*) *Ward* v. *Weeks*, *Parkins* v. *Scott*, post, ch. 17, s. 2.

(*d*) *Scott* v. *Shepherd*, 3 Wils. 403; 2 W. Bl. 892.

for the loss of the wine (*e*). "If I ride upon a horse, and J. S. whips the horse so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the assault and battery, and not I" (*f*).

Wherever a party is guilty of misconduct in leaving anything dangerous in a place, where he must know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and that injury is brought about, the sufferer may have redress by action against both the wrong-doers (*g*), unless he has himself been a co-operative cause of the injury of which he complains, under circumstances which deprive him of a claim to legal redress (*h*).

If the natural result of a wrongful act committed by a defendant has been to plunge the plaintiff into a chancery suit, and thereby to cause him to incur costs and expenses, whatever might be the event of the suit, there is that conjunction of wrong and damage which will give the plaintiff a good cause of action (*i*). If a seaman, or a passenger on board ship, engages in acts of smuggling, and thereby causes the vessel to be condemned and forfeited, the shipowner is entitled to recover the value of the vessel from the wrong-doer who has caused the loss; and it is no answer to the action to show that the plaintiff's servants on board participated in the illegal transaction (*k*).

It is not necessary to show that actual pecuniary damage has been sustained in order to establish that conjunction of damage and wrong which is necessary to create a tort; for a party may be legally damnified although he has sustained no pecuniary loss. "The damage," observes Lord Holt, "is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage." So, a man shall have an action against another for riding over his ground, though it do him no pecuniary injury, for it is an invasion of his property, and the other had no right to come there (*l*); and if the trespasser wilfully perseveres in trespassing after being warned off, exemplary damages will be recovered (*m*).

A landowner who starts a pheasant on his own land, and shoots the bird whilst it is flying over the adjoining land of his neighbour, commits a trespass if he goes on such adjoining land to pick it up; and if he carries the dead bird away with him, he would now probably be held guilty of

(*e*) *Vandenburgh* v. *Truax*, 4 Denio, U. S. R. 464.

(*f*) *Gibbons* v. *Pepper*, 1 Ld. Raym. 38.

(*g*) *Illidge* v. *Goodwin*, 5 C. & P. 190. *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*h*) Post, p. 16.

(*i*) *Dixon* v. *Fawcus*, 30 Law J., Q. B. 187; 3 L. T., N. S. 693.

(*k*) *Blewitt* v. *Hill*, 13 East, 14.

(*l*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 955. *Sears* v. *Lyons*, 2 Stark, 318; post, ch. 6.

(*m*) *Merest* v. *Harvey*, 5 Taunt. 441; post, ch. 6, s. 3; ch. 22, s. 1, DAMAGES.

another tort, and liable to an action for the conversion to his own use of the dead bird as well as for the original trespass (*n*).

Every unauthorised interference by one man with the goods and chattels and personal property of another constitutes a tort, and gives rise to a cause of action, although no pecuniary damage may be sustained (*o*). If a man, without having any legal authority to excuse or justify the act, writes any remarks or observations upon a cab-driver's license, or upon another man's certificate of character or good conduct, he is guilty of a tort, and is responsible in damages, although no pecuniary loss has been incurred (*p*).

Damages are recoverable from a person who takes up tombstones in a churchyard, and defaces the inscriptions, for although the freehold of the churchyard is in the parson, the property in the tombstones remains in the persons who erect them (*q*).

Every injury to a right imports a damage, though it does not cost the party one farthing (*r*), for wherever the plaintiff establishes some legal right or title in himself which has been invaded, weakened, or destroyed by the unlawful or malicious act of the defendant, there is a wrong and damage in law resulting therefrom, in respect of which an action is maintainable for pecuniary compensation, though no actual pecuniary loss can be proved (*s*).

Where a man is entitled to have a stream of water flowing through his land, he may maintain an action for substantial damages for the diversion of the water, though he has not used, and does not want to use, the water (*t*).

Wherever a tenant makes material alterations in property demised to him, by opening new doors, putting up new buildings, taking down partitions, or changing the form and appearance of a house without the consent of the landlord, he is responsible in damages for infringing upon the proprietary rights of the latter, although the premises may be improved and rendered more valuable by the alterations (*u*).

Every invasion of the plaintiff's right by the fraudulent act of the defendant entitles the plaintiff to some damages. Thus, where an inventor or manufacturer adopts a particular trade-mark, and the defendant imitates it and uses it for the purpose of palming off his own goods as the goods of the plaintiff, the plaintiff is entitled to substantial damages, as his

(*n*) *Osbond* v. *Meadows*, 12 C. B., N. S. 10; 31 Law J., C. P. 281; M. C. 238. *Blades* v. *Higgs*, post, ch. 7, s. 2.

(*o*) Post, ch. 7, s. 1.

(*p*) *Rogers* v. *Macnamara*, 14 C. B. 37; 23 Law J., C. P. 1.

(*q*) *Spooner* v. *Brewster*, 3 Bing. 139. *Frances* v. *Ley*, Cro. Jac. 367.

(*r*) *Bonomi* v. *Backhouse*, 1 Ell. Bl. & Ell. 657. Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 954.

(*s*) *Embrey* v. *Owen*, 6 Exch. 353; 20 Law J., Exch. 212. *Rochdale Canal Co.* v. *King*, 14 Q. B. 135. *Webb* v. *Portland Manufact. Co.*, 3 Sumner's Amer. Rep. 197. *Bower* v. *Hill*, 1 Sc. 526.

(*t*) *Embrey* v. *Owen*, 6 Exch. 353; post, ch. 2, s. 1.

(*u*) *Cole* v. *Green*, 1 Lev. 309, and cases cited post, ch. 5, s. 1.

right has been invaded, although no specific damage can be proved (*x*). Every infringement of a right ex contractu also creates a claim to damages. Therefore, where one person maliciously procures or persuades another to break a contract, or interferes between an employer and workman to prevent the latter from completing work he has undertaken to perform, or procures the non-delivery of goods according to contract (*y*), or deprives a woman of her marriage by false representations, substantial damages are recoverable (*z*).

A refusal by a banker to pay the order or draft of his customer, he having at the time in his hands sufficient funds of the customer for the purpose, is a wrongful act, injurious to the credit of the customer, entitling him to substantial damages, although no actual damage can be proved at the trial (*a*).

The procurement of the violation of a right creates a cause of action in all instances where the violation is an actionable wrong—as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent for the wrong done (*b*).

Where the plaintiff complained that his wife had unlawfully left him and lived apart from him, and that whilst she was so living apart a large fortune was left her, to her separate use, and she, being desirous of returning to the plaintiff to cohabit with him, and the plaintiff being willing and desirous to be reconciled to her, the defendant unlawfully and unjustly persuaded, procured, and enticed her to continue absent and apart from the plaintiff and conceal herself from him, whereby the plaintiff lost the comfort and society of his said wife, and her aid and assistance in his domestic affairs, and the enjoyment of the fortune that had been left her, it was held that this was a wrong and damage such as the law would not leave without a remedy (*c*).

The general legal rights of mankind are the rights of personal security, personal liberty, or private property; and private property is either property in possession, property in action, or property that an individual has a special right to acquire (*d*).

Wherever personal security has been violated by an assault, or individual liberty has been infringed by unlawful restraint of the person (post, ch. 12), an action for substantial damages is maintainable, although the personal inconvenience and suffering may be of the slightest character; and wherever the wrong is accompanied by circumstances of

(*x*) *Blofield* v. *Payne*, 4 B. & Ad. 410. *Rodgers* v. *Nowill*, 5 C. B. 125; post, ch. 18.

(*y*) *Green* v. *Button*, 2 C. M. & R. 707. *Lumley* v. *Gye*, 2 Ell. & Bl. 238.

(*z*) *Sheppard* v. *Wakeman*, 1 Lev. 53.

(*a*) *Marzetti* v. *Williams*, 1 B. & Ad. 415. *Rolin* v. *Steward*, 14 C. B. 595; 23 Law J., C. P. 148.

(*b*) Erle, J., *Lumley* v. *Gye*, 2 Ell. & Bl. 216.

(*c*) *Winsmore* v. *Greenbank*, Willes, 577.

(*d*) Bayley, J., *Hannam* v. *Mocket*, 2 B. & C. 937.

personal insult, or by a false charge or accusation of some crime or misdemeanour, exemplary damages will be recoverable (*e*).

There are many cases in which an act is perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, or lights a fire thereon, doing no damage in the first instance to his neighbour, but subsequently causing his neighbour's land to slide down into the artificial hollow (*f*), or the neighbour's house to be burned by the unexpected spreading of the fire (*g*).

Injuries to property indirectly brought about by menaces, false representation, or fraud, create as valid a cause of action as any direct injury from force or trespass. Thus, if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done (*h*).

Questions of proprietary right often involve nice distinctions. Thus, as regards the right of a landowner or occupier of lands to the preservation on his land, and to the means of reducing into his possession, birds and animals feræ naturæ, it has been held that the owner of a decoy pond may maintain an action against a person who wilfully discharges guns near the decoy pond, and frightens away the wild fowls (*i*), because wild fowl are protected by the statute 25 Hen. 8, c. 11, and constitute a known article of food; and the keeping of a decoy pond is useful to the public, and a profitable mode of employing the land; but that no such action is maintainable against a person who has wilfully and maliciously discharged guns near the plaintiff's rookery, and frightened away the rooks, and caused them to forsake the plaintiff's trees, for rooks have been declared to be a nuisance by the legislature; and no person can claim a right to have them resort to his lands, nor can any person become a wrong-doer by preventing their so doing (*k*).

Literary and artistic property.—Every one has at common law a right to the exclusive possession and enjoyment of his intellectual and manual labours, so that if a man devotes his private hours to literary composition, or artistic works, another person has no right to appropriate to himself the produce of his labour without his consent. The unpublished manuscript of the author, for example, cannot be used, copied, or published, without his authority (*l*); nor the unpublished lectures of

(*e*) Post, ch. 22, s. 1.

(*f*) *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 662; 28 Law J., Q. B. 378.

(*g*) *Fillister* v. *Phippard*, 11 Q. B. 347. *Tubervil* v. *Stamp*, 1 Salk. 13.

(*h*) 1 Roll. Abr. 108, pl. 21.

(*i*) *Keble* v. *Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington* v. *Taylor*, 11 East, 571.

(*k*) *Hannam* v. *Mockett*, 2 B. & C. 943.

(*l*) *Queensberry* (*Duke of*) v. *Shebbeare*, 2 Eden, 329.

a lecturer (*m*); nor the picture, etching, or portrait of the painter or photographer (*n*). If, therefore, a geologist gets a fossil engraved or photographed, in order to send it to his friends, or the owner of a picture or a portrait lends it to a friend to get it engraved, any one who gets possession of the photograph or the engraving has no right at common law to take copies of it for sale. And whoever handles or deals with photographs, without the consent of the owner of them, in order to get negatives from them, or for any other purpose, is guilty of an act for trespass (*o*).

Interference by force or fraud with the free exercise of another's trade or occupation, or means of livelihood, is a tort—such as preventing people by the use of threats and intimidation from trading with the plaintiff's vessel in a foreign port (*p*), or dealing at the plaintiff's shop, or sending their children to the plaintiff's school, or placing obstructions and impediments in the way of the exercise of the right of free access to and from a man's place of business (*q*).

Where the plaintiff's declaration of his cause of action set forth that he was a mason, and possessed of a stone quarry, and quarried and dug stones therefrom, as well to sell as to build stone buildings, and that the defendant, intending to deprive him of the benefit of his quarry, disturbed his workmen and all comers, threatening to maim and vex them with suits if they worked or bought stones there, whereupon all the buyers desisted from buying and the workmen from working there, it was held that this was a great damage to the plaintiff and a good cause of action (*r*).

"There are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege, the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another should use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But where one man doth damage to another by using the same employment no action will lie, because one man has as much liberty to use an employment as another." Thus, where one schoolmaster sets up a new school to the damage of an ancient school, and thereby the old scholars are allured from the old school to come to the new school, an action is not main-

(*m*) *Abernethy* v. *Hutchinson*, 1 H. & Tw. 40; 3 Law J., Ch. 209.

(*n*) *Prince Albert* v. *Strange*, 1 Mac. & Gord. 42; 18 Law J., Ch. 120.

(*o*) *Mayall* v. *Higby*, 1 H. & C. 148; 31 Law J., Exch. 329; 10 W. R. 631; post, s. 2, and post, ch. 7.

(*p*) *Tarleton* v. *Mc. Gawley*, Peake, 270.

(*q*) *Bell* v. *Mid. Rail. Co.*, 10 C. B., N. S. 307; 30 Law J., C. P. 273.

(*r*) *Garret* v. *Taylor*, Cro. Jac. 567.

tainable (*s*). But "if a man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars" (*t*).

Interference with a man's trade by fair competition is never actionable. The loss in such a case is not, in fact, caused by wrong, but by another's exercise of his undoubted right; and in every complicated society the exercise, however legitimate, by each member of his particular rights, or the discharge, however legitimate, by each member of his particular duties, can hardly fail to cause conflicts of interest which will be detrimental to some. It is essential, therefore, to the maintenance of an action of tort, that the act complained of should be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will do him harm is not enough (*u*).

If a fisherman fits out a boat with lines and nets, and goes to fish in the high seas, and another fisherman comes and fishes beside him, and with tempting baits, or other contrivances, draws away the fish from the lines and nets of the first comer, with the view of catching them himself, an injury may be done; but there is no tort or wrong, for the one had as much right to fish, and use fair and reasonable means to catch fish, as the other: but if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water and drives away the fish, and prevents the latter, by force or violence, from exercising his occupation and calling, there is then a wrong done to him, and he is entitled to compensation in damages (*x*).

Disturbance of a ferry.—The owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way, and whoever makes a landing-place near the ferry, so as to be in substance the same as the ferry landing-place, making no material difference to travellers, is guilty of a tort. But if the public convenience requires a new passage at such a distance from the old ferry as makes such new passage a real convenience to the public, the proximity seems to be not actionable. The area for the monopoly of a ferry, therefore, depends on the need of the public for a new passage (*y*). In an action for the disturbance of a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time the cause of action accrued. The right is an incorporeal right, unaccompanied in general with any property in the soil (*z*).

Disturbance of a market.—If people come to a market to sell their

(*s*) 11 Hen. 4, fol. 47, pl. 21; fol. 14, pl. 23.

(*t*) Per Holt, C. J., *Keeble* v. *Hickeringill*, 11 East, 576, n.

(*u*) *Rogers* v. *Rajendro Dutt*, 13 Moore, P. C. C. 241.

(*x*) *Young* v. *Hichens*, 6 Q. B. 606.

(*y*) *Newton* v. *Cubitt*, 12 C. B., N. S. 32; 31 Law J., C. P. 246.

(*z*) *Peter* v. *Kendal*, 6 B. & C. 710.

wares, they are subject to toll, which is payable to the owner of the market (*a*); and if they come near the boundary of the market, and avail themselves of the concourse of persons coming to and fro, to find customers, and sell without the boundary of the market, so as to avoid the payment of the toll, an action is maintainable against them by the owner of the market for a disturbance of the market (*b*). But it must be proved that the thing was done wilfully and intentionally (*c*). According to Fleta a new market, opened within seven miles of an existing legally established market, is actionable (*d*). Such a limit might be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns, where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished, and would now depend upon the public need for it (*e*).

Market tolls.—A toll imposed on the occupier of every stall erected for the sale of articles is a toll on the stall itself, and not on the articles sold at the stall, for the occupier is to pay the toll whether he brings the article to the market or not, and he pays in respect of the space his stall occupies, and not on the articles he sells (*f*). But when the toll is placed on the specific article, such as a toll on every horse sold within the limits of the market, then the article cannot be lawfully sold without payment of the toll (*g*).

Torts founded on contract.—A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a party, the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of contract, or an action ex delicto for the breach of duty, may be brought at the option of the plaintiff. When there is a violation of a legal right existing independent of any contract between the parties, such as an invasion of a right of property or of the right of personal security, or an injury to character and reputation, then the tort is not founded on contract, and an action ex delicto is alone maintainable. Whenever an action of tort is founded on contract, an action is maintainable for nominal damages, although no actual damage can be proved (*h*); but the plaintiff who brings the action must be a party

(*a*) *Gt. Yarmouth (Mayor, &c.)* v. *Groom*, 32 Law J., Exch. 74.

(*b*) *Bridgland* v. *Shapter*, 5 M. & W. 375.

(*c*) *Brecon (Mayor &c. of)* v. *Edwards*, 31 Law J., Exch. 368.

(*d*) Fleta, lib. 4, c. 28, s. 13.

(*e*) Willes, J., 31 Law J., C. P. 254.

(*f*) *Caswell* v. *Cook*, 11 C. B., N. S. 637; 31 Law J., M. C. 185.

(*g*) *Llandaff &c. Market Co.* v. *Lyndon*, 30 Law J., M. C. 105, as to sale of horses by a licensed auctioneer. And as to penalties for carrying things for sale from house to house within the boundaries of a market, *Caswell* v. *Cook*, ut sup. As to the right to a stall in an ancient market, and the right of shopkeepers to place stalls in the street in front of their houses on market-days, *Ellis* v. *Mayor, &c. of Bridgnorth*, 8 L. T. R., N. S. 688.

(*h*) *Marzetti* v. *Williams*, 1 B. & Ad. 423.

to the contract, for no person can in general sue in respect of a tort founded on contract who was not party, or privy to, and could not have sued upon, the contract (*i*); and the cause of action cannot be transferred to one to whom the contract itself is not transferable (*k*).

Breach of duty.—Wherever facts and circumstances can be shown to exist which create a duty on the part of the defendant towards the plaintiff, and there has been a breach of that duty, and a consequent damage to the plaintiff, an action for damages is maintainable. "If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal to perform it; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number from concurring are answerable to the party injured" (*l*). But before an action can be maintained, it must of course be clearly proved that the law imposes upon the defendant the duty which he is charged with neglecting (*m*).

If facts are proved showing it to be the duty of a joint-stock company to register the plaintiff as a shareholder, and grant him a certificate of proprietorship of shares in the company, the company will be responsible in damages for neglecting their duty in that behalf, though no actual pecuniary damage is proved to have been sustained by the plaintiff (*n*).

Breach of duty on the part of public officers.—Public functionaries appointed to act ministerially are liable to an action at the suit of any one who suffers damage from their neglect or refusal to perform the functions of their offices. Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion intrusted to them; but where the functions of the public officer are partly ministerial and partly judicial, an action cannot be brought against him unless malice be averred and proved (*o*).

Public officers employed in the public departments, in the conduct and management of the public business of the country, are not responsible for the negligence and misconduct of those who act under them, although such subordinate officers have been appointed by them. Thus the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer, &c., have never been held liable in damages for the negligence or misconduct of the inferior officers in their several departments. A Queen's officer stationed on board ship

(*i*) *Winterbottom* v. *Wright*, 10 M. & W. 109, explained *Blakemore* v. *Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1049. *Robertson* v. *Fleming*, 4 Macq. H. L. C. 167.

(*k*) *Howard* v. *Shepherd*, 9 C. B. 321.

(*l*) Ld. Brougham, *Ferguson* v. *Earl Kinnoul*, 9 Cl. & Fin. 305.

(*m*) *Curlewis* v. *Broad*, 31 Law J., Exch. 473.

(*n*) *Catchpole* v. *Ambergate, &c. Rail. Co.*, 1 Ell. & Bl. 120; 22 Law J., Q. B. 35.

(*o*) Post, ch. 15.

to do his duty there, is not responsible for the negligent acts of his subordinate officers, nor is the Postmaster-General responsible for the negligence or misconduct of clerks and letter-sorters employed and appointed by him for the execution of certain public duties in the Post Office, but these public functionaries are responsible to every individual who sustains damage by reason of their own personal neglect or misconduct (*p*). Thus, if the man who carries the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own (*q*). The collector of customs is, in like manner, responsible in damages to all who sustain a direct and immediate injury from a neglect by him to execute the duties of his office, and for refusing to sign a bill of entry which it was his duty to sign, or to make an order which it was his duty to make (*r*).

Whenever a public officer abuses or neglects the powers or duties of his office, either by an act of commission or omission, and in consequence thereof an injury accrues to an individual, and no special remedy for enforcing performance of the public duty is appointed by statute, an action for damages is maintainable against such public officer; and every one who is appointed to discharge a public duty, and receives a compensation, whether from the crown or otherwise, is constituted a public officer. If a bishop, by neglecting to perform the plain duties of his office, inflicts an injury upon another, an action for damages is maintainable against him. And if a clergyman wrongfully refuses to administer the sacrament to a man, who is thereby prejudiced in his civil rights, or the registrar of births should refuse to register the birth of a person, and so cause him to lose an estate, an action for damages would be maintainable. So, if a lord of a manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, an action for damages would lie against such lord (*s*).

If a superintendent of customs uses the power he possesses for the purpose of obstructing or ruining the trade of a particular merchant, he is responsible in damages for the injury he occasions (*t*). But a surveyor of highways, upon whom is imposed the obligation of keeping in repair the highways of which he has charge, is not liable to an action by reason of his omission to repair the highways, a statutory remedy for the enforcement of the public duty being provided by the highway act (*u*).

Breach of duty by postmasters—Non-delivery of letters.—A postmaster

(*p*) *Lane* v. *Cotton*, 1 Salk. 17.

(*q*) *Whitfield* v. *Lord Le Despenser*, Cowp. 765.

(*r*) *Barry* v. *Arnaud*, 10 Ad. & E. 670.

(*s*) *Henly* v. *Mayor of Lyme*, 5 Bing. 108. *Ferguson* v. *Earl Kinnoul*, 9 Cl. & Fin. 251.

(*t*) *Rogers* v. *Ragendro Dutt*, 13 Moore, P. C. C. 209.

(*u*) *Young* v. *Davis*, post, ch. 16; 5 & 6 Wm. 4, c. 50, ss. 20, 41.

is bound to deliver letters at the respective places of abode of the persons to whom they are directed, and is liable to an action on the case for substantial damages if he fails to do so. All deputy-postmasters are responsible for their own personal misfeazance, for they are all made public officers, and charged with a great public trust since the legislative establishment of the post-office. If, therefore, a person to whom a letter is addressed cannot be found at the place indicated, it is the duty of the postmaster to make reasonable inquiry after him (*x*).

Negligence and breach of duty on the part of consignors and bailors of chattels.—The law imposes upon all persons employing others to carry explosive, corrosive, or dangerous articles, concealed in bottles, boxes, or packages, the duty of giving reasonable notice to the persons they employ of the character of such articles, in order that proper precautions may be taken to prevent injury to themselves and to others; and if no such notice is given by the employer, and damage is sustained by the party employed from the want of notice, there is that conjunction of damage and wrong which will support an action (*y*).

Every person, also, who hires out or lends a chattel to another, knowing at the time that the chattel has dangerous defects which may make the thing perilous to use, is bound to disclose to the hirer or borrower the existence of such defects, and if damage is sustained by reason of the non-disclosure thereof, there is both damage and wrong, and an action is maintainable (*z*). But it is otherwise if the party was wholly ignorant of any secret defect or hidden source of danger, as he cannot of course disclose what he does not know (*a*). Where the duty grows out of a contract between the parties, no one can, in general, sue for a breach of that duty who was not privy to, and could not have sued upon, the contract (*b*).

Torts founded on negligence.—"The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury" (*c*). There must be affirmative proof of negligence on the part of the defendant to support an action, for where it is a perfectly even balance on the evidence whether the injury has resulted from the want of proper care on the part of one side or the other, the party who founds his claim on the imputation of negligence fails to establish it (*d*). The

(*x*) *Rowning* v. *Goodchild*, 2 W. Bl. 908. *Smith* v. *Powdich*, 1 Cowp. 182.

(*y*) *Farrant* v. *Barnes*, 32 Law J., C. P. 137; post, ch. 8, s. 1. *Brass* v. *Maitland*, 6 Ell. & Bl. 470; 26 Law J., Q. B. 49.

(*z*) *Blakemore* v. *Brist. & Ex. R. Co.*, 8 Ell. & Bl. 1051; post, ch. 9.

(*a*) *Mac Carthy* v. *Young*, 6 H. & N. 329.

(*b*) *Winterbottom* v. *Wright*, ante, p. 13.

(*c*) Wilde, B., 7 H. & N. 603. *Swan* v. *North Brit. Austr. Co.*, 31 Law J., Exch. 437.

(*d*) *Colton* v. *Wood*, 8 C. B., N. S. 568; 29 Law J., C. P. 333. *Hammack* v. *White*, 11 C. B., N. S. 588. Ld. Wensleydale, *Morgan* v. *Sim*, 11 Moore, P. C. C. 312.

damage, too, must be the proximate and not the remote cause of the negligence, and must not be the immediate result of any intervening negligence on the part of the plaintiff himself (ante, p. 5); for if the plaintiff's own carelessness has directly conduced to the damage he has sustained, he is the author of his own misfortune, and cannot charge it upon others (*e*).

Contributory negligence on the part of the plaintiff, who complains that he has been damnified by the negligence of the defendant, is in general an answer to the action, on the ground that a man cannot complain of that which he has himself helped to bring about. Thus, where a man hid one hundred pounds sterling in some hay in an old nail bag, and delivered it to a common carrier to be carried to a banker, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the exceeding value of the bag, and had thereby prevented him from taking proper care of it (*f*).

So, where the consignor concealed a quantity of guineas in an ordinary brown paper parcel tied with a string (*g*), and a number of sovereigns in a packet of tea (*h*), and several hundred pounds' worth of bank-notes and gold in an ordinary school boy's box, and the money so sent was lost by the way, it was held that the common carrier was not responsible for the loss of it (*i*). And if glass, or china, or fragile articles requiring great care for their safe conveyance, are put into boxes and packages and delivered to a carrier to be carried, and no notice is given to the latter of the peculiar nature of the contents of such packages, and of the additional care required for their safe conveyance, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage, as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles, and the amount of care requisite for their safe conveyance.

Wherever, indeed, the immediate and proximate cause of the damage is the plaintiff's own supineness, carelessness, or unskilfulness, he has no ground of action against the defendant, though the primary and original cause of damage be the defendant's wrongful act. Thus, where some bricklayers employed by the defendant had wrongfully laid several barrowfuls of lime rubbish before the defendant's door, by the side of a highway, and whilst the plaintiff was passing in his chaise the wind raised a whirlwind of this rubbish, which frightened the plaintiff's horse and

(*e*) See post, ch. 8, s. 1, as to Contributory negligence. *Young* v. *Grote*, 12 Moore, 484; 4 Bing. 253.

(*f*) *Gibbon* v. *Paynton*, 4 Burr. 2298.

(*g*) *Clay* v. *Willan*, 1 H. Bl. 298.

(*h*) *Bradley* v. *Waterhouse*, 3 C. & P. 318.

(*i*) *Batson* v. *Donovan*, 4 B. & Ald. 37. *Mayhew* v. *Eames*, 3 B. & C. 601; 5 D. & R. 487.

caused it to start on one side, in the direction of an approaching waggon, and the plaintiff, to prevent the horse from running against the waggon, pulled him sharp round, and the horse then ran over a lime-heap lying before another man's door, and the shaft was broken by the shock, and the horse, being then still more frightened, ran away and upset the chaise, and threw the plaintiff out and injured him, it was held that although the defendant was to blame for putting the rubbish by the side of the road, yet if the plaintiff's running against the second heap of rubbish was owing to his pulling the horse round too sharp, the immediate cause of the injury was his own unskilfulness in the management of his horse, rather than the original wrongful act of the defendant (*k*).

Where the plaintiff complained that the defendant had hired him to carry a load of timber to Ipswich, and that he carried the timber there and asked the defendant where it was to be deposited, but the defendant would give no directions, and made the plaintiff's horses, which were heated, stay so long in the waggon that they took cold and some of them died, and the rest were spoiled, it was held that the immediate and proximate cause of the injury to the horses was the plaintiff's own neglect, in not having them taken out of the waggon and put into a stable, and that the original wrongful act of the defendant, in not finding a place of deposit for the timber, was not sufficiently connected with the loss of the horses to render the defendant responsible for such loss (*l*).

But the negligence or misconduct on the part of the plaintiff disentitling him to an action for compensation must be such as he is legally responsible for, and such as the law recognises as a co-operative cause of the injury. Where the defendant left his horse and cart for a long time unattended in the street, where some little boys were at play, and some of the boys got into the cart, and another boy led the horse on to give them a ride, and one boy fell off the shafts and got his leg crushed under the wheel, it was held that the defendant was responsible for the fall and the broken leg, as it was the natural result of his misconduct in leaving the cart unattended, and that the boy, in consequence of his tender years and natural instinct for play, and want of reflection and foresight, could not be considered legally responsible for the damage he had sustained, so as to be precluded from recovering compensation from the defendant (*m*).

And though a man may not disaffirm his own careless or culpable acts, and complain of the consequences which those acts have brought about in the conduct or omission of others, yet the rule must be limited to such consequences as are in some degree direct and not collateral; pro-

(*k*) *Flower* v. *Adam*, 2 Taunt. 314.
(*l*) *Virtue* v. *Bird*, 2 Lev. 196.
(*m*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

bable, though perhaps not necessary (*n*). Although there may have been contributory negligence on the part of the plaintiff, yet if the damage is not the necessary, or ordinary, or likely result of such negligence, but is due to some wholly unlooked-for and unexpected event, which could not reasonably have been anticipated or expected to be likely to occur, such contributory negligence will be too remote to be set up as a bar to the action. Thus, if the customer of a banker, who is desired to keep his cheque-book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been anticipated that the power of obtaining a cheque would induce a servant to commit a forgery (*o*).

Where negligence on the part of the plaintiff is remotely connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action (*p*).

Thus, where the plaintiff negligently left his donkey in a public highway, tied together by the fore-feet, and the defendant carelessly drove over and killed the ass with his horses and waggon in broad daylight, the animal being unable to get out of the way of the waggon, it was held that the misconduct of the plaintiff, in leaving the ass in the highway, was no answer to the action; for, although the ass might have been wrongfully there, still the defendant was bound to go along the road with care, and at such a pace as would be likely to prevent mischief. "Were this not so, a man might justify the driving over goods left in a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (*q*).

Contributory negligence on the part of the plaintiff, therefore, will not disentitle the plaintiff to recover damages, unless it were such that, but for that negligence, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*r*).

Liability of the defendant in respect of the remote ulterior and unusual consequences of a negligent act.—"I entertain," observes Pollock, C. B.,

(*n*) Wilde, B., *Swan* v. *North Brit. Austr. Co.*, 31 Law J., Exch. 437; 32 ib. Exch. Ch.

(*o*) *Bank of Ireland* v. *Trustees Ev. Charity*, 5 H. L. C. 411. *Swan* v. *North Brit. Austr. Co.*, Ex. Ch; 2 N. R. 526. *Taylor* v. *Gt. Ind. Penins.*, 28 Law J., Ch. 285; ib. 714.

(*p*) *Greenland* v. *Chaplin*, 5 Exch. 248.

(*q*) *Davies* v. *Mann*, 10 M. & W. 549. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 376.

(*r*) *Tuff* v. *Warman*, 5 C. B., N. S. 585. *Scott* v. *Dub. & Wick. Rail. Co.*, 11 Ir. C. L. R. 396.

"considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur" (*s*).

Where the owner of a horse negligently allowed his horse to stray on the high road, it was held that the owner would be responsible for all such damage as in the ordinary sequence of events might be expected to occur therefrom, such as the horse's walking into a neighbouring pasture, and consuming the grass there, or wandering into a corn-field and trampling down the corn; but not for a kick to a child in the road, unless it could be shown that the horse was naturally of a vicious disposition, and wont to kick, and that the owner knew of it at the time he allowed the horse to stray into the highway (*t*). Where cattle afflicted with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease, it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disorder, as well as for the injury to the grass and herbage (*u*). But the mere fact of the defendant's scabby sheep getting amongst the plaintiff's healthy flock, and infecting them with the disorder, establishes no cause of action, unless it be proved that the defendant knew them to be infected, and neglected to take proper and reasonable precautions to prevent them from getting mixed with healthy flocks (*x*), or that he knowingly and wilfully turned them out on some common or waste, &c., or exposed them for sale in a market or public place (*y*).

If the owner of a dog allows the dog to stray away and trespass on his neighbour's land, and the dog worries and kills the neighbour's sheep, the owner of the dog is not responsible for the damage done, as the worrying and killing of sheep is, it is said, not in accordance with the ordinary instinct of the animal, and would not in the ordinary sequence of events be expected to result from a dog being allowed to stray away from his master's premises; but if the dog has previously worried sheep with the knowledge of the owner, the law throws upon the latter the duty of keeping the animal on his own premises, and not suffering him to go at large (*z*). The mere keeping of an animal of a

(*s*) *Greenland* v. *Chaplin*, 5 Exch. 248. *Bank of Ireland* v. *Trustees Evans Charities*, 5 H. L. C. 411.

(*t*) *Cox* v. *Burbidge*, 13 C. B., N. S. 430; 32 Law J., C. P. 89.

(*u*) *Andrews* v. *Buckton*, 1 Str. 192.

(*x*) *Cooke* v. *Waring*, 32 Law J., Exch.

(*y*) 38 Geo. 3, c. 65, s. 1; 11 & 12 Vict. c. 107; 21 & 22 Vict., c. 62.

(*z*) Anon. Dyer, pl. 162. *Baker* v. *Webberly*, Het. 171. *Jenkins* v. *Turner*, Ld. Raym. 109. *Card* v. *Case*, 5 C. B. 622. And see 25 & 26 Vict. c. 59.

fierce nature, such as a tiger or bear, or a dog known to be wont to bite, is unlawful, and, therefore, if any person is bitten or injured by such an animal, an action is maintainable against the person who keeps it (*a*).

Liability of the master for the negligence of his servant.— Every servant acting in the execution of his master's business represents the master himself, and his acts are, in contemplation of law, the acts of his master. This rule of law applies not only to domestic servants, who have the care of carriages, horses, and other things in the employ of the family, but to other servants whom the master or owner selects and appoints to do any work, or superintend any business, although such servants be not in the immediate employ, or under the superintendence, of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind, or hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So, in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer (*b*). But whenever one man employs another to execute a particular work respecting personal moveable property, and that other furnishes his own servants to do the work, the servants so furnished are not to be considered in the same light as if they were servants selected, hired, and paid by the person who orders the execution of the work.

A master is responsible for the wrongful act of his servant, even if it be wilful, or reckless, or malicious, provided the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for the master's benefit (*c*); but if the servant, at the time he does the wrong, is not acting in the execution of the master's business, and within the scope of his employment as his servant,

(*a*) *May* v. *Burdett*, 9 Q. B. 112. *Cox* v. *Burbidge*, 13 C. B., N. S. 440.
(*b*) *Laugher* v. *Pointer*, 5 B. & C. 554. *Dalyell* v. *Tyrer*, 28 Law J., Q. B. 52.
(*c*) *Huzzey* v. *Field*, 2 Cr. M. & R. 432, 440.

but is carrying into effect some exclusive object of his own, the master will not be answerable for his act. Thus, it is said, "if I command my servant to distrain, and he ride on the distress, he shall be punished, and not I" (*d*). So, "if my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished (*e*); and if my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser, and not I, because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts" (*f*).

But where the servant, though acting contrary to his duty to his master, is nevertheless acting in the course of his employment, the master will be answerable for his misconduct (*g*). Thus, where a partially intoxicated passenger in an omnibus refused to get out and to pay his fare when the omnibus arrived at its destination, and the conductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that there was evidence for the jury of the wrongful act having been done by the servant in the course of his employment about the master's business, and the omnibus proprietor was made responsible for the injury (*h*).

Wherever the master intrusts a horse, or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of the master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. Where the master was riding along a public highway with a mounted groom behind him, and the master having suddenly quickened his pace, the groom spurred his horse to keep up with him, whereupon the horse struck out with his hind legs and kicked a waggoner who was walking in the road at the head of his team, it was held that the master was responsible for the injury (*i*).

In all cases of negligent and improvident driving by a servant employed to drive, the master will be responsible if the servant was driving about the master's business, or using the master's horses and carriage for the master's benefit; and the master cannot exonerate himself from liability by showing that the servant was acting in disobedience of his orders. Where, therefore, an omnibus company gave written instructions to their drivers, "to drive at a steady pace, and not on any

(*d*) Noy's Maxims, ch. 44.
(*e*) Bro. Abr. TRESPASS, pl. 435.
(*f*) 2 Roll. Abr. 553.
(*g*) See further, as to injuries from negligence, post, ch. 8, s. 2.
(*h*) *Seymour* v. *Greenwood*, 6 H. & N. 359; 30 Law J., Exch. 189, 327; 7 ib. 355, qualifying *M'Manus* v. *Cricket*, 1 East, 107.
(*i*) *North* v. *Smith*, 10 C. B., N. S. 572.

account to race with or obstruct other omnibuses," and a driver disobeyed these instructions, and wilfully drew across the road to obstruct another omnibus, and ran against it and upset it, it was held that the instructions given by the omnibus company to their servants could not exonerate the company from responsibility for the careless, wilful, or malicious acts of such servants whilst carrying passengers for the benefit of the company (*k*). Where, however, both the party injured and the person inflicting the injury are fellow-servants in the same employment, the master is generally, as we shall presently see, exempt from liability (*l*).

Indemnification of the master by the servant.—If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant, and the verdict and judgment in the action against the master are evidence of the amount of these damages, but not of the circumstances under which they were recovered (*m*). If the captain of a ship engages in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the latter to lose his property (*n*).

Fraud and falsehood are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom, there is the damage and wrong necessary to create a cause of action. "An action cannot be supported for telling a bare naked lie, where no loss or damage is caused by the lie, but if it be attended with damage, it then becomes the subject of an action" (*o*). Fraud may consist in the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true, and which it was his duty to make known (*p*).

If A fraudulently makes a representation which is false, and which he knows to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers damage, B may maintain an action against A for the deceit, there being here that conjunction of wrong and loss which entitles an injured and suffering party to compensation in damages (*q*). Where the father of the plaintiff went to the defendant, a gun-maker, and told him that he wanted a gun, safe and fit to use, for the plaintiff, his son, and the defendant gave the father a false and fraudulent warranty with a gun which he sold and

(*k*) *Limpus* v. *Lond. Gen. Om. Co.*, 1 H. & C. 526; 32 Law J., Exch. 34.

(*l*) Post, ch. 8, s. 1.

(*m*) *Green* v. *New River Co.*, 4 T. R. 590.

(*n*) *Blewitt* v. *Hill*, 13 East, 12.

(*o*) Kenyon, C. J., *Pasley* v. *Freeman*, 3 T. R. 65. *Collins* v. *Cave*, 6 H. & N. 131; 30 Law J., Exch. 55. Croke, J., *Bailey* v. *Merrell*, 3 Bulstr. 95.

(*p*) *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 Law J., Exch. 322.

(*q*) Com. Dig. Action on the Case for a Deceit (A 9), (A 10). *Pasley* v. *Freeman*, 3 T. R. 51. *Gerhard* v. *Bates*, 2 Ell. & Bl. 489; post, ch. 18.

delivered to him for the use of the plaintiff, and the plaintiff was injured by the bursting of the gun in his hand, it was held that, there being here both fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the defendant was responsible to the plaintiff for the injury he had sustained (*r*).

Where the defendant wrongfully and maliciously caused certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien, it was held that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act (*s*).

A refusal to obey the lawful decree of a court of justice is a wrong; and if a party is thereby prejudiced, or impeded, or hindered in the exercise of his legal rights, there is that conjunction of wrong and damage which will support an action (*t*).

Malicious injuries.—The foundation of every action of tort is a wrongful act, but it need not be malicious, for malice is not a necessary ingredient in a wrong. An imprisonment of the person, for example, a battery, or a trespass on land, may be committed without any express or implied malice, and yet an action for damages may be maintained (*u*). But every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it is a tort, and may be made the foundation of an action. Malice may be proved by evidence of personal hostility and spite entertained against the injured party, or of any other corrupt or improper motive (*x*). If a free burgess of a corporation, or any other person having an undoubted right at law to give his vote at an election of a burgess or knight to serve in parliament, be maliciously hindered or impeded in the exercise of his right, an action for damages is maintainable against the disturber (*y*). Any person has a right to stand for a place in parliament, or to offer himself as a candidate for a vacant office; and if an election takes place, and it becomes difficult to determine who has the majority, he is entitled to demand a poll; and if the public officer who ought to have granted the poll maliciously denies it, he is liable to an action for substantial damages (*z*); for if public officers will maliciously infringe men's rights, and "refuse to receive a vote which the party tendering has a right to give, and if an action for it comes to

(*r*) *Langridge* v. *Levy*, 2 M. & W. 529. *Levy* v. *Langridge*, 4 ib. 338.

(*s*) *Green* v. *Button*, 2 C. M. & R. 707.

(*t*) *Ferguson* v. *Earl Kinnoul*, 9 Cl. & Fin. 311.

(*u*) *Rogers* v. *Ragendro Dutt*, 13 Moore, P. C. C. 209.

(*x*) *Tozer* v. *Child*, 7 Ell. & Bl. 381.

(*y*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 954.

(*z*) *Starling* v. *Turner*, 2 Lev. 50.

be tried before me," observes Holt, C. J., "I will direct the jury to make them pay well for it" (*a*). In order to maintain the action, the plaintiff must show that the refusal was founded in malice; for "if the returning officer has acted honestly and uprightly, according to the best of his judgment, he is not amenable to an action" (*b*).

The functions of the returning officer are not wholly ministerial, but are partly judicial and partly ministerial; and a judicial officer cannot be made responsible for an erroneous or wrong judgment, where he has acted *bonâ fide* in a matter of which the law gives him cognizance (*c*). "It cannot be contended that he is to exercise no judgment, no discretion whatever, in the admission or rejection of votes, and he could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action" (*d*).

In the celebrated case of *Ashby v. White*, where an action was brought against a returning officer for maliciously hindering an elector in the enjoyment of his electoral right, by refusing to receive his vote at an election, Lord Holt observes, "I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in his declaration, and so found by the jury, that they did it by fraud and malice. And so the defendant is an offender within the very words of the statute of Westminster" (*e*).

Malicious procurement of loss or damage to another, whether brought about by libel or slander (post, chap. 17), or by instigating servants to leave their service or desert their employment, to the injury of their masters, or by maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, create that conjunction of wrong and damage which will support an action (*f*). If one person incites another to commit perjury, or forgery, or a nuisance, or to bring a false charge or accusation, and the accused party is acquitted of the charge, the instigator of the wrongful act is responsible for all its injurious consequences (*g*). Thus, where the mistress of a wine-shop brought an action against the defendant for procuring a soldier and others to come into her house with a man dressed in woman's clothes, and there conduct themselves with indecency, and collect a crowd, and raise a cry of "bawdy house," by reason whereof the mob threw stones and broke the plaintiff's windows, and damaged and

(*a*) *Ashby* v. *White*, 2 Ld. Raym. 958. *Herring* v. *Finch*, ib. 250.

(*b*) Abbot, C. J., *Cullen* v. *Morris*, 2 Stark. 587.

(*c*) Post, ch. 15.

(*d*) Abbot, C. J., *Cullen* v. *Morris*, 2 Stark. 587.

(*e*) Ld. Holt's judgment in *Ashby* v. *White*, Lond. 1837; cited *Tozer* v. *Child*, 7 Ell. & Bl. 381.

(*f*) *Lumley* v. *Gye*, 2 Ell. & Bl. 228. *Green* v. *Button*, 2 C. M. & R. 707.

(*g*) Com. Dig. Action upon the Case, A. *Coxe* v. *Smith*, 1 Lev. 119. *Fitzjohn* v. *Mackinder*, 9 C. B., N. S. 516; 30 Law J., C. P. 257.

destroyed her furniture, it was held that the defendant was responsible for all the damage sustained by the plaintiff, although he did not himself appear upon the scene, or join in the cry (*h*).

Abuse of authority by governors of colonies.— An officer representing his sovereign in all functions, civil and military, may be made to answer for an abuse of his authority, and for the exercise of arbitrary power, above and beyond the law. An act of authority, lawful in itself if rightly done, may become wholly unlawful and unjustifiable by the harsh, oppressive, and cruel manner in which it is executed; for, where the law authorises an act to be done, it does not protect unnecessary violence or cruelty in the doing of it (*i*).

Every governor of a colony is responsible in damages for unlawfully spoiling, plundering, or imprisoning Her Majesty's subjects. But whatever is a justification in the place where the thing is done, may be pleaded as a justification in the place where the cause of action is tried (*k*). Where a carpenter, who followed a train of artillery, but who was not subject to martial law, brought an action against the governor of Gibraltar for an assault and battery, and showed that he had been tried by court-martial, and sentenced to be whipped, and that the governor confirmed the sentence, which was then carried into effect, it was held that the action was maintainable against the governor, by reason of his participation in the unlawful whipping, and the plaintiff recovered 700*l.* damages (*l*).

Abuse of authority on the part of naval and military officers.—An action is not maintainable by a subordinate officer against his superior officer for an act done in the course of discipline, and under powers incident to his position (*m*); but for a corrupt and malicious abuse of authority a commanding officer is responsible. Every superior officer has a right to imprison his subordinate officer for any military offence, and bring him to a court-martial; but this gives him no right to act in an arbitrary and oppressive manner, and to inflict a prolonged, harsh, and cruel imprisonment, without bringing the person imprisoned to trial. If an officer has been guilty of a scandalous abuse of a public trust, he will not be allowed to shelter himself under the thin veil of legal forms, nor escape under cover of a justification, the most technically regular, from the consequences of his wrong-doing (*n*).

A naval or military officer is not responsible for acts done by him in obedience to the commands of his superior officer, or of the Government he serves, unless the commands are manifestly illegal. The justification

(*h*) *Plunket* v. *Gilmore*, Fortescue, 211.
(*i*) *Sutherland* v. *Murray*, 1 T. R. 538; post, ch. 5.
(*k*) *Mostyn* v. *Fabrigas*, Cowp. 161.
(*l*) ——— v. *Sabine*, cited Cowp. 175.
(*m*) *Johnstone* v. *Sutton*, 1 T. R. 544.
(*n*) Ld. Mansfield, *Wall* v. *M'Namara*, 1 T. R. 536.

of an officer sued for acts of force and violence may be made to rest upon a subsequent ratification of his acts by his government, as well as upon a precedent authority (*o*).

Where two vessels were chartered by the government for a naval expedition, and the captains of the vessels were to pay implicit obedience to the orders of the officers commanding the expedition, and one of the vessels sustained damage from the other whilst acting in obedience to orders, it was held that the owner of the vessel doing damage could not be made responsible to the owner of the vessel to which the damage was done, if the damage was the natural result of the execution of the orders given, and was not caused by negligence or want of nautical skill in the execution of the orders (*p*).

Where commissioners of public works, exercising powers given to them by statute, and acting within their jurisdiction, nevertheless act in an arbitrary, wanton, or negligent and oppressive manner, and inflict unnecessary injury upon private individuals, they are responsible for their wrong-doing of what might have been rightly done, and cannot protect themselves under cover of their statutory powers from the consequences of their negligence and misconduct (*q*).

Torts committed by British subjects in foreign countries.—Actions may be maintained in this country for wrongs committed by one of the Queen's subjects against another of her subjects in a foreign country, if all that is sought is reparation in damages, or satisfaction to be made by process against the person of the wrong-doer or against his effects, within the jurisdiction of the court (*r*). Thus, when Captain Gambier pulled down some sutlers' houses in Nova Scotia, who supplied spirits to his sailors, and afterwards inadvertently brought one of the sutlers home in his own ship, and the sutler, as soon as he landed, brought an action against the captain, it was held that the action was maintainable (*s*). But, in order to support an action in this country for an injury sustained abroad, it must, it is apprehended, be shown that the act producing damage was a wrongful act by the law of the country in which it was done; for if it was justifiable there, the justification would, it is apprehended, be available here (*t*).

Suspension of the remedy by action when the tort amounts to a felony.—Whenever a wrongful act amounts to a felony, the remedy for the tort, or civil wrong, is postponed until the requirements of public justice have

(*o*) *Buron* v. *Denman*, 2 Exch. 167.

(*p*) *Hodgkinson* v. *Fernie*, 2 C. B., N. S. 436.

(*q*) *Leader* v. *Moxon*, 2 W. Bl. 296; 3 Wils. 461; post, ch. 16, s. 1.

(*r*) *Scott* v. *Lord Seymour*, 1 H. & C. 219; 31 Law J., Exch. 457; 8 Jur. N. S. 568.

(*s*) Per Ld. Mansfield, Cowp. 180.

(*t*) Per Ld. Mansfield, *Mostyn* v. *Fabrigas*, 1 Cowp. 175; 1 Smith's L. C. 607. *Dobree* v. *Napier*, 2 Bing. N. C. 797. *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1. Contra Wightman, J., *Scott* v. *Lord Seymour*, ut sup.

been satisfied by the prosecution of the offender (*u*). "The policy of the law," observes Lord Ellenborough, "requires, that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence; and after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution. Where, therefore, the defendant has been tried and acquitted of a felony, the objection founded upon the general policy of the law does not apply. The only difference which can be suggested between the case of a prior conviction and that of an acquittal is, that the acquittal may have been brought about by the defendants colluding with the prosecutor; but if the acquittal be shown, either in pleading or by evidence, to have been obtained by collusion, it would be put aside, and the objection would still remain. All the mischief, therefore, that could result from extending the same rule to cases of acquittal which has established the right to sue after a conviction of the felon, is done away by letting the defendant in to show that the judgment of acquittal was obtained *per fraudem* (*x*).

The doctrine of the merger of a trespass in a felony, therefore, only means that all redress by action for the private injury is suspended until the criminal law has been put in force. It was never intended to take away redress absolutely after the ends of public justice were attained, but only to stimulate the party injured to bring the offender to trial for the public offence, and to prevent any compromise thereof. When, therefore, a robber had been convicted of felony for breaking into a house and stealing 250*l.*, it was held that an action for the trespass and the taking of the money was maintainable against him after his conviction for the felony (*y*). And if money has been taken under a claim of right, and under circumstances manifestly not amounting to a felony, an action may be brought for the money, notwithstanding that the criminal law has not been put in force; and it does not lie in the mouth of the defendant to say that he is a thief, and that he stole the money, if the surrounding circumstances do not establish a case of felony, for "nemo allegans suam turpitudinem est audiendus" (*z*). And if the injured party has preferred a bill of indictment, which has been thrown out, or not proceeded with, by the suggestion of the judge, he has satisfied the requirements of

(*u*) *Wellock* v. *Constantine*, 7 Law T. R., N. S. 751; 2 F. & F. Exch. 791.

(*x*) *Crosby* v. *Leng*, 12 East, 413; 1 Hale, P. C. 546.

(*y*) *Dawkes* v. *Coveneigh*, Styles, 346. *Markham* v. *Cobb*, W. Jones, 147.

(*z*) *Lutterell* v. *Reynell*, 1 Mod. 283. *Stone* v. *Marsh*, 6 B. & C. 564.

the law in respect of the prosecution of the public offence, and is remitted to his civil remedy (*a*).

This rule of law prohibiting an action for the recovery of stolen property or its value, until the criminal law has been put in force, does not extend beyond the person robbed, and the thief or the felonious receiver; for if stolen property is innocently taken in pledge by a pawnbroker, or purchased out of market overt, an action may be brought against the pawnbroker or purchaser before the institution of any prosecution for the felony (*b*).

And whenever the death of a person has been caused by any wrongful act, neglect, or default, an action for damages is maintainable, although the death has been caused under such circumstances as amount in law to a felony (*c*).

Cheating by forgery.—If a forgery has been committed, and the party injured has prosecuted for the offence, he may maintain an action for the recovery of the money of which he has been defrauded. Where the plaintiff's declaration of his cause of action set forth that the plaintiff's servant, having 65*l.* of the plaintiff's money in his custody, the defendant, in order to defraud the plaintiff of the money, procured a letter to be written in the name of the plaintiff, directed to his said servant, requiring the latter to pay the money to the defendant, and counterfeited the signature of the plaintiff to the letter, and also the plaintiff's seal, and caused the said counterfeit letter to be delivered to the plaintiff's servant, as being the plaintiff's letter, and thereby obtained possession of the plaintiff's money, and converted it to his own use, it was held that there was a good cause of action (*d*). "If a man forge a bond in my name, I can have no action, unless I am sued upon the bond; but then I may for the wrong and damage, though I can avoid the bond by plea. But if it were a recognizance or a fine, I should have a writ of deceit presently" (*e*).

Actions for bigamy.—Where the plaintiff declared that she was a virgin, and sought for in marriage, and that the defendant, pretending to be a single person, made love to her and married her, when in truth he was married to another woman, the court held that the action lay. But bigamy being now made a felony by statute, a prosecution for the public offence is a condition precedent to the right of action (*f*).

Actions for misdemeanours.—Where the wrongful act amounts only to a misdemeanour, the remedy for the wrong is not suspended until the offender has been brought to trial for the indictable offence; but the injured party may at once bring an action for damages, whether he does

(*a*) *Dudley and West Bromw. Bank Co.* v. *Spittle*, 1 Johns. & H. 14; 8 W. R. 351.

(*b*) *White* v. *Spettigue*, 13 M. & W. 608. *Lee* v. *Bayes*, 18 C. B. 599; post, ch. 7, s. 2.

(*c*) 9 & 10 Vict. c. 93, s. 1.

(*d*) *Tracy* v. *Veal*, Cro. Jac. 223.

(*e*) 43 Ed. 3, 20. *Waterer* v. *Freeman*, Hob. 266.

(*f*) Anon. Skin. 119.

or does not subsequently prosecute (*g*). This is the case where the money of the plaintiff has been obtained by the defendant by false pretences and converted to his own use, and the action is brought to recover back an equivalent for the money fraudulently obtained. Where persons conspire together to procure a forgery of title-deeds, and give them in evidence on a particular trial, and the deeds are forged and given in evidence, and any person's land is thereby lost, all the parties to the conspiracy are liable to an action for damages, as well as to an indictment for the misdemeanour (*h*). If two men conspire to make it appear that a third person has been guilty of a felony, by placing stolen goods upon his premises, and he is in consequence thereof convicted, an action for damages would be maintainable against the conspirators, whether the parties had or not been indicted for the misdemeanour (*i*).

Public and private wrongs.—For an injury which affects all persons alike, such as an obstruction in a public thoroughfare, merely impeding the right of passage, and rendering the way less convenient, the only mode of proceeding is by indictment. For any special injury which affects an individual beyond his fellows, such as being delayed in making a journey, and compelled to take a circuitous course (*k*), or driving against the obstruction during a dark night, compensation in damages may be obtained (*l*).

Of the legal maxim that there is no wrong without a remedy.—The maxim of the law, "ubi jus ibi remedium," has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case, where the novelty of the complaint is no objection to the action, provided an injury cognizable by law be shown to have been inflicted on the plaintiff (*m*); for "this form of action was introduced for the reason that the law would never suffer a wrong and a damage without a remedy" (*n*); but there are many cases where parties have suffered serious injury from the acts and doings of others of which the law takes no cognizance. An action, for example, cannot be maintained against a commanding officer in the army or navy for maliciously accusing, arresting, and bringing to a court-martial a subordinate officer, however great may have been the perversion of his authority, and however false and unfounded the charge (*o*); and a wife has no remedy for being deprived of the society of her husband by slander, not amounting to a charge of adultery, causing him to desert her, and treat her with

(*g*) *Reg.* v. *Hardey*, 14 Q. B. 541.
(*h*) Fitzh. N. B. 116, D.
(*i*) Post, ch. 13.
(*k*) *Greasly* v. *Codling*, 2 Bing. N. C. 263. *Rose* v. *Miles*, post, ch. 4.
(*l*) *Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281; post, ch. 4, s. 2, DAMAGES.
(*m*) See the note to *Ashby* v. *White*, 1 Smith's L. C. 213–223.
(*n*) Willes, C. J., *Winsmore* v. *Greenbank*, Willes, 577.
(*o*) *Sutton* v. *Johnstone*, *Johnstone* v. *Sutton*, 1 Bro. P. C. 76; 1 T. R. 512.

cruelty (*p*). No action will lie against a witness for uttering false statements in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously, and without any reasonable or probable cause, and damage results therefrom to the plaintiff, the proper course being a prosecution for perjury (*q*).

Damages are not recoverable from an infant for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to lend him money (post, ch. 18); nor from a married woman and her husband for a false and fraudulent representation by such married woman that she was a feme sole, whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married (*r*); or that the signature to a bill of exchange was her husband's signature, whereby the plaintiff was induced to advance money upon the bill (*s*); nor from a man who has seduced a female infant, not being at the time of her seduction in her father's service, actual or constructive, even though the father be thereby obliged to provide nurses and medical attendance for her, and to maintain her (*t*).

Waiver of tort.—If a man has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property; or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterwards treat him as a wrong-doer, nor can he affirm his acts in part, and avoid them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong (*u*).

SECTION II.

OF RIGHTS, DUTIES, AND OBLIGATIONS CREATED BY BY-LAW AND BY STATUTE (*x*).

By-laws founded on statute, imposing penalties for the suppression of certain torts, are cumulative upon the ordinary common-law remedy by

(*p*) *Lynch* v. *Knight*, 9 H. L. C. 577; 8 Jur. N. S., H. L. 724.

(*q*) Erle, C. J., *Barber* v. *Lesiter*, 7 C. B., N. S. 187.

(*r*) *Liv. Adelph. Loan Asso.* v. *Fairhurst*, 9 Exch. 429.

(*s*) *Wright* v. *Leonard*, 11 C. B., N. S. 258; 30 Law J., C. P. 365.

(*t*) *Grinnell* v. *Wells*, 8 Sc. N. R. 741; 7 M. & Gr. 1033.

(*u*) *Brewer* v. *Sparrow*, 7 B. & C. 310. *Lythgoe* v. *Vernon*, 5 H. & N. 180; 29 Law J., Exch. 164.

(*x*) See further as to this, post, ch. 16.

way of action, and do not prevent a plaintiff who has sustained damage from an injury to his property or person, or an infringement of his legal right, from bringing his action just the same as if no by-law had ever been made, for "wherever an action lies at common law, the penalty is accumulative" (*y*). By-laws imposing penalties, and establishing a summary mode of proceeding for the recovery of such penalties, are regarded with the utmost jealousy, and must be made in strict pursuance of statutory authority, more especially where they restrain the freedom and liberty of the subject beyond the requirements of the ordinary law. The power of making them is an extraordinary power, and will be narrowly construed. "We must," observes Alderson, B., "look closely to the powers given by the legislature, to see whether the by-law is within the scope of the authority, or whether it does not relate to matters which ought to be left to the general law of the land, by which the general conduct of the Queen's subjects is regulated" (*z*).

By-laws of municipal corporations.—By s. 90 of the municipal corporations act (5 and 6 Wm. 4, c. 76), the council of any borough is empowered to make by-laws for the good rule and government of the borough, and the suppression of nuisances. By s. 91, all the provisions of the statute relative to offences against the act, punishable upon summary conviction, are made to apply to offences committed in breach of any by-law made by virtue of the act (*a*); and by s. 1, all laws, statutes, and usages inconsistent with that act are repealed and annulled. By-laws of corporations "must ever be subject to the laws of the realm, and subordinate thereto; and, therefore, though there is no provision for that purpose, the law supplies it. And if the king, in his letters patent of incorporation, do make ordinances himself, yet they are also subject to the same rule of law" (*b*). The power of making by-laws for the "good rule and government" of a borough has reference to the government of the borough as a corporation, and the making of regulations for carrying into effect the purposes for which it was incorporated; for the election of the mayor, aldermen, and councillors, the appointment of the officers of the corporation, and the enforcement of their several duties (*c*); the management and disposition of the corporate property; the carrying on trade within the municipality; the prevention of fraud, and the sale of unfit and improper commodities; the prevention of nuisances by butchers, tallow-chandlers, and persons carrying on noxious trades in crowded localities; and generally for securing fair dealing and

(*y*) Per Cur. *Rowning* v. *Goodchild*, 2 W. Bl. 910. *Beckford* v. *Hood*, 7 T. R. 627. *Couch* v. *Steel*, 3 Ell. & Bl. 414.

(*z*) *Calder* v. *Hibble Nav. Co.* v. *Pilling*, 14 M. & W. 87. *Tailors of Ipswich*, 11 Rep. 101. *Brown* v. *Local Board of Holyhead*, 32 Law J., C. P. 25.

(*a*) As to summary convictions upon by-laws, see post, ch. 15, s. 1.

(*b*) *Norris* v. *Staps*, Hob. 211; 1 Roll. Abr. CORPORATIONS, G. pl. 4.

(*c*) *Rex v. Westwood*, 4 B. & C. 781.

convenient arrangement amongst the shopkeepers and traders of the municipality (*d*). It does not enable a town council to carry out any peculiar ideas of general good government, and to impose penalties on persons for the doing of things which are not prohibited by any public statute, nor by the common law (*e*).

The power of making by-laws for the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance (post, ch. 4). It does not empower the town council to impose penalties for the doing of things which may or may not be a nuisance, according to circumstances. Thus, where the town council of a borough imposed a fine upon every person who should "keep, or suffer to be kept, any swine within the borough, between the first of May and the first of October," it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance (*f*).

By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, in the nature of a contract founded on mutual promises (*g*). They are binding also on all persons who come to inhabit a municipality, and to carry on trade within it (*h*).

By-laws for the prevention of indecent bathing.—The bathing clauses in the town police clauses act (s. 69), incorporated into many special acts recently passed for the government and improvement of towns, enable local authorities, where any part of the sea-shore or strand of any river is used as a public bathing-place, to make by-laws for fixing the stands of bathing-machines on the sea-shore or strand, and the limits within which persons of each sex shall be set down for bathing, and within which persons shall bathe, and for preventing any indecent exposure of the persons of the bathers.

The statutory power here conferred, of fixing the limits within which persons shall bathe, does not enable a town council or local board to impose penalties on persons bathing outside those limits, without reference to the decency or indecency of the proceeding, or its lawfulness or unlawfulness, by the general law of the land. The clauses are enabling, and not disabling, clauses. They were framed to facilitate the providing of bathing-machines, and the making of arrangements for enabling persons of both sexes to undress and bathe in public places where, in the absence of such arrangements, no persons could undress and bathe without indecency, and without running the risk of being prosecuted for a

(*d*) Wilcock on Corporations, pp. 141–146.

(*e*) *Reg.* v. *Wood*, 5 Ell. & Bl. 55. *Reg.* v. *Rose*, 24 Law J., M. C. 130.

(*f*) *Everett* v. *Grapes*, 3 Law T. R., N. S., Q. B. 669. *Wanstead Local Board, &c.*, v. *Hill*, 13 C. B., N. S. 479.

(*g*) *Tobacco Pipe, &c. Co.* v. *Loder*, 16 Q. B. 765; post, ch. 21.

(*h*) *Pierce* v. *Bartrum*, Cowp. 270.

misdemeanour (*i*). They were not intended to impose any additional restraint upon bathers, beyond what is imposed by the general law; or to authorise the prohibition of bathing by town councils, according to their whim or caprice, without reference to time, circumstance, or locality, the lawfulness or unlawfulness of the act in reference thereto, and the existence or non-existence of any nuisance.

All restraints imposed by by-law beyond what is imposed by the general law of the land are invalid, unless a satisfactory reason is shown for them, and an express statutory authority for their imposition (*k*).

By-laws by public commissioners, local boards, and public companies.—The power of making by-laws for certain specified purposes, and for imposing penalties for breach of such by-laws (*l*), is also granted by the companies clauses consolidation act (8 Vict. c. 16, ss. 124–127), the railways clauses act (8 Vict. c. 20, ss. 108–11), the markets and fairs clauses act (10 Vict. c. 14, ss. 42–49), the commissioners' clauses act (10 Vict. c. 16, ss. 96–98), the harbours, docks, and piers clauses act (10 Vict. c. 27, ss. 83–90), the towns' improvement clauses act, (10 & 11 Vict. c. 34, ss. 128, 200–207); and the town police clauses act (10 & 11 Vict. c. 89, ss. 68–71) (*m*). A summary mode of proceeding is established for the recovery of the penalties imposed under the authority of these statutes, but the recovery of the penalty will not protect a wrongdoer from an action for damages, or to a claim for compensation, wherever the commission of the penal offence is in itself a tort, and gives rise to a cause of action at common law (post, pp. 34, 35).

Commissioners, or local boards acting under these statutory authorities, have no general power of making by-laws affecting strangers. They cannot make by-laws to carry out the general powers of the statute from which they derive their authority, but only the special powers enabling them to make by-laws for the specified and declared purposes (*n*).

By-laws in restraint of trade, made by trading companies and corporations in the exercise of a power conferred upon them by charter or by statute, must be reasonable and beneficial to the public, or they cannot be supported (*o*).

A by-law may be good in part and bad in part, when the two parts are entire and distinct from each other, but not otherwise (*p*).

(*i*) *Rex* v. *Crunden*, 2 Campb. 89.

(*k*) *Calder & Hebble Nav. Co.* v. *Pilling*, 14 M. & W. 83.

(*l*) As to the recovery of penalties generally, see post, ch. 15, s. 1.

(*m*) Cox's Consolidation Acts, by Tayler.

(*n*) Crompton, J., *Reg.* v. *Wood*, 5 Ell. & Bl. 57. *Child* v. *Hudson's Bay Co.* 2 P. Wms. 208.

(*o*) *Gunmakers' Co.* v. *Fell*, Willes, 389. *Calder & Hebble Nav. Co.* v. *Billing*, supra. *Rex* v. *Newcastle Coopers, &c.*, 7 T. R. 548.

(*p*) *Reg.* v. *Lundie*, 31 Law J., M. C. 157.

There is no power to apprehend a person for the breach of a by-law, in order to bring him before a magistrate, unless such a power is expressly given by statute (*q*).

Remedies for the enforcement of statutory duties and obligations.— The statute of Westminster the second (1 stat. 13 Ed. 1), c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any obligation or duty created or imposed by statute (*r*); and "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law (*s*). Wherever a statute creates a right, or a duty, or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to that right or obligation follows as an incident (*t*). But when the right or duty is entirely the creature of the statute, and a specific remedy is provided by the statute for its enforcement, that remedy, and that only, must be pursued (*u*), unless the remedy does not cover the entire right (*x*).

Wherever an act of parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the contrary (*y*), or provides some specific remedy, or particular mode of proceeding for the recovery of the money, and there is no contract or obligation to pay independently of the statute. When the duty or obligation exists independently of the statute, the statutory remedy is simply cumulative, and does not preclude the ordinary common-law remedy by way of action, unless there are express words to that effect (*z*).

The remedies provided by the Friendly societies acts, for redressing disputes between these societies and their members (*a*), are cumulative upon the common-law remedy by action, where such remedy exists independently of the statute, unless the right of action is taken away by express legislative enactment (*b*).

Of the imposition of a penalty as a cumulative, exclusive, or alternative remedy, for the protection of a right, or the suppression of a wrong.—

(*q*) *Chilton* v. *Lond. & Croyd. Rail. Co.*, 16 M. & W. 212. *Reg.* v. *Mann*, 23 Law T. R. 12.

(*r*) 2 Instit. 486.

(*s*) Com. Dig. Action upon Statute, F.

(*t*) Maule, B., *Braithwaite* v. *Skinner*, 5 M. & W. 327.

(*u*) *Stevens* v. *Evans*, 2 Burr. 1157. *Underhill* v. *Ellicombe*, M'Clel. & Y. 455. *Doe* v. *Bridges*, 1 B. & Ad. 859. *Dundalk Western Rail. Co.* v. *Tapster*, 1 Q. B. 667. *Stevens* v. *Jeacocke*, 11 Q. B. 741; 17 Law J., Q. B. 163. *St. Pancras Vestry* v. *Batterbury*, 2 C. B., N. S. 477; 26 Law J., C. P. 243.

(*x*) *Shepherd* v. *Hills*, 11 Exch. 67. Williams, J., *St. Pancras Vestry* v. *Batterbury*, 26 Law J., C. P. 243.

(*y*) Parke, B., *Shepherd* v. *Hills*, 11 Exch. 67. *Tilson* v. *Warwick Gas Light Co.* 4 B. & C. 967; 7 D. & R. 376. *Cane* v. *Chapman*, 5 Ad. & E. 659.

(*z*) Com. Dig. Action upon Statute, C. *Chapman* v. *Pickersgill*, 2 Wils. 145.

(*a*) Addison on Contracts, 5th ed. pp. 735–739.

(*b*) *Sinden* v. *Bankes*, 30 Law J., Q. B. 102.

Where a statute vests a right generally in a person, or imposes some new duty upon one party for the benefit of another, and gives a penalty against those who infringe the right or neglect the duty, and by reason of the infringement of the right, or the neglect of the duty, a special and particular damage has resulted to the plaintiff, the annexation by the statute of the penalty for the offence recoverable by a common informer does not preclude the plaintiff from his common-law remedy by action for damages (*c*), although it is competent to him, if he is first in the field, to sue for the penalty (*d*). The penalty is recoverable for the breach of the public duty, though no damage may have actually been sustained by anybody, and is cumulative upon the ordinary remedy by action for damages. But where the statute, creating a new duty or obligation, provides a mode of obtaining compensation for private special damage, and gives the amount recovered to the party grieved or injured by the neglect of the statutory duty, there is no other remedy than that given by the act, either for the public or the private wrong.

Where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favour of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for the doing of it, an action for damages is not maintainable. Thus, where statutory regulations were established for the management of the pilchard fishery, and specific penalties appointed for the breach of each regulation, and the plaintiff, a fisherman, brought an action for damages for breach by the defendant of one of the regulations, whereby the plaintiff lost his proper turn and station in fishing, and the defendant was enabled to make a valuable capture of fish, which would otherwise have fallen to the lot of the plaintiff; it was held that the action was not maintainable, as no particular right was created and vested in the plaintiff, nor any particular duty in his favour imposed upon the defendant. The latter was merely prohibited from doing a particular act under pain of incurring a penalty for disobedience, and the enforcement of the penalty was the only mode of proceeding against him (*e*). Where, on the other hand, a statute (*f*) imposed upon a shipowner the duty of keeping a constant supply of certain medicines on board for the use of sick seamen, and appointed a penalty for every default, recoverable by the first person who sued for it; the amount, when recovered, to be divided between the informer and the seaman's hospital; and the medicines were not kept, and the plaintiff, being a seaman on board, and having contracted a fever, was deprived of the benefit of the medicines, and in consequence thereof sustained a long and dangerous illness; it was

(*c*) *Couch* v. *Steel*, 3 Ell. & Bl. 414. *Rowning* v. *Goodchild*, 2 W. Bl. 906.
(*d*) *Beckford* v. *Hood*, 7 T. R. 627.
(*e*) *Stevens* v. *Jeacocke*, 11 Q. B. 741.
(*f*) 7 & 8 Vict. c. 112, s. 18.

held that he was entitled to maintain an action for damages, notwithstanding the imposition of the penalty (*g*).

Infringement of statutory copyright — Penalties and actions for damages. —To put an end to the doubts which formerly existed as to the extent and duration of the rights of authors of published works (*h*), the statute 8 Ann. c. 19 was passed, defining these rights and protecting the enjoyment of them by the imposition of penalties. These penalties were cumulative upon the common-law remedy for the infringement of the right founded upon the statute, so that the author, if he was first in the field, might sue for the penalty as well as for the damages he had sustained (*i*). The statute of Anne, however, has been repealed by 4 & 5 Vict. c. 45 (*j*), which provides a special remedy by action on the case for the recovery of damages from any person who causes a book to be printed for sale or exportation without the consent in writing of the proprietor of the copyright; or who imports for sale or hire any such unlawfully printed book, or with a guilty knowledge sells, publishes, or exposes to sale or hire, or has in his possession for sale or hire, any such book, without the consent of the proprietor. Penalties are also imposed (s. 17) upon unauthorised parties unlawfully importing books reprinted abroad, or selling, publishing, &c., such books, or having them in their possession for sale or hire. These penalties are cumulative upon the remedy by way of action (*k*).

But no proprietor of copyright in books, &c. (except dramatic pieces) commencing after the 10th June, 1833, can sue or. proceed for any infringement of his copyright before making an entry of it at Stationers' Hall, and all actions for offences committed against the copyright amendment act must be commenced within twelve months after the commission of the offence (*l*).

The act guards against piracy of words and sentiments; but it does not prohibit writing on the same subject. Thus, in the case of histories, a man may give a relation of the same facts, and in the same order of time; and in the case of dictionaries, an interpretation may be given of the identical same words. The same principle holds with regard to charts; whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly of the

(*g*) *Couch* v. *Steel*, 3 Ell. & Bl. 410.

(*h*) *Donaldson* v *Beckett*, 2 Bro. P. C. 129. *Millar* v. *Taylor*, 4 Burr. 2303. *Jefferys* v. *Boosey*, 4 H. L. C. 846–989. *Reade* v. *Conquest*, 11 C. B., N. S. 479; 30 Law J., C. P. 213.

(*i*) *Beckford* v. *Hood*, 7 T. R. 627.

(*j*) This statute repeals also 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156.

(*k*) *Novello* v. *Sudlow*, 12 C. B. 188, ante p. 35. As to forfeiture of copies of piratical editions, *Delf* v. *Delamotte*, 3 K. & J. 581; and as to the protection in the colonies of works entitled to copyright in England, 10 & 11 Vict. c. 95; and as to international copyright, 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12. *Avanzo* v. *Mudie*, 10 Exch. 203.

(*l*) 5 & 6 Vict. c. 45, ss. 24, 26. As to articles published in magazines and periodical works, *Mayhew* v. *Maxwell*, 1 Johns. & H. 312.

subject here any more than in the other instances; the jury must decide whether it is a servile imitation or not (*m*). If, however, the great bulk of the work consists of a mere mass of pirated matter, the author or composer of the work will be liable to an action for damages, and also to an injunction to prevent the sale of the work (*n*).

No copyright can be gained in a work which is founded on fraudulent representation and deceit, and professes to be written by some celebrated author when it is not so written, or in a work which is subversive of good order, morality, or religion (*o*).

Infringement of copyright in lectures—Penalties and actions for damages.—By 5 and 6 Wm. 4 c. 65, vesting the sole right of printing and publishing lectures in the author and his assigns (*p*), penalties are imposed upon all persons taking down, or making a copy of such lectures, and printing or otherwise copying and publishing them, without leave of the author or his assigns, and upon all persons selling or publishing copies, &c., or exposing them for sale without consent, &c. These penalties are cumulative upon the common-law remedy by way of action (*q*); but it is provided (s. 5) that the act shall not extend to lectures of which notice in writing has not been given to two justices, in manner therein mentioned, nor to lectures delivered in a university or public school, or college, or on a public foundation, &c.

In all lectures printed and published by the author or his assigns there is now the same copyright as in printed books (*r*).

Infringement of copyright in published dramatic literary property and musical compositions.—Where one man employs another, for reward, to compose a musical or dramatic piece, the composition is the property of the employer (*s*). Where the defendant represented the incidents of a published novel in a dramatic form upon the stage, it was held that this was not an infringement of the copyright in the novel, as the defendant had neither printed nor multiplied copies of the work (*t*). But a person who prints a drama constructed out of a novel infringes the copyright in the novel (*u*). Where the defendant published a drama called "Gold," and then printed and published the drama in the form of a novel, and the defendant's son dramatized the novel without having seen or known of the plaintiff's drama "Gold," but the consequence was that much of the

(*m*) *Cary* v. *Longman*, 1 East, 362. *Jarrold* v. *Houlston*, 3 Kay & J. 708.

(*n*) *Campbell* v. *Scott*, 11 Sim. 38. *Bohn* v. *Bogue*, 10 Jur. 420. *Tinsley* v. *Lacey*, 32 Law J., Ch. 2, N. R. 438. *Hotten* v. *Arthur*, ib. 2 N. R. 485; post, ch. 23.

(*o*) *Wright* v. *Tallis*, 1 C. B. 907; 14 Law J., C. P. 283.

(*p*) As to the author's right at common law, see ante, p. 9.

(*q*) S. 1. *Beckford* v. *Hood*, ante, p. 36.

(*r*) 5 & 6 Vict. c. 45.

(*s*) *Hatton* v. *Kean*, 7 C. B., N. S. 268. 2 L. T., N. S. 10.

(*t*) *Reade* v. *Conquest*, 9 C. B., N. S. 755; 30 Law J., C. P. 209. As to assignments of copyright, see Addison on Contracts, 5th edit. p. 126. *Cumberland* v. *Copeland*, 31 Law J., Exch. 353.

(*u*) *Tinsley* v. *Lacy*, 32 Law J., Ch.

defendant's drama was the same as the plaintiff's, it was held that this was an infringement of the copyright in the drama, and that the defendant's son could not be considered the author of those parts of the drama which he copied directly from the plaintiff's novel, and indirectly from the plaintiff's drama (*v*). A dramatic production, therefore, to be entitled to copyright, must be an original work, and not a mere copy of novels or works of fiction, in which there is an existing copyright. If, however, the drama is partly made up of new matter, the composer will be entitled to copyright in such new original matter (*w*). And if a musical composer adapts words of his own to an old air, he acquires a copyright in the combination (*x*).

Unlawful representation of dramatic pieces and musical compositions.—The statutes 5 and 6 Vict. c. 45, ss. 20, 21, and 3 and 4 Wm. 4, c. 15, vesting the sole and exclusive right of representing or performing dramatic pieces or musical compositions in the author and his assigns, impose penalties on all persons who, during the continuance of the right, represent or cause to be represented, without the consent in writing of the author or proprietor, such dramatic pieces or musical compositions at any place of dramatic entertainment. These penalties are given as an alternative remedy, the author or proprietor having the option of either suing for the penalty or bringing an action for all the profit accruing from the representation, or all the loss he has sustained at his election; but the action must be brought within twelve calendar months (*y*): an assignment of the copyright of a book consisting of, or containing a dramatic piece or musical composition, does not convey the right of representation to the assignee, unless the intention of the parties to that effect is duly registered (*z*).

No one can be considered as an offender against these statutes, so as to be liable to an action at the suit of an author or proprietor, unless he, by himself or his agent, actually takes part in the representation (*a*).

Infringement of the Sculpture Copyright Acts.—The statutes for the encouragement of the art of making models and casts of busts (*b*), (54 Geo. III. c. 56), vest the sole right of property in every new original sculpture, model, copy, cast, and bust, for a certain term, in the person who makes or causes it to be made, provided the name of such person, and the date of publication, are put on the work, before it is put forth or published. A remedy for the infringement of the right of property by persons making or importing copies, or exposing for sale, or disposing of,

(*v*) *Reade* v. *Conquest*, 11 C. B., N. S. 479. 31 Law J., C. P. 153. *Reade* v. *Lacy*, 30 ib. 655.

(*w*) *Cary* v. *Longman*, 1 East, 360.

(*x*) *Lover* v. *Davidson*, 1 C. B., N. S. 182.

(*y*) 3 & 4 Wm. 4, c. 15, ss. 2, 3.

(*z*) 5 & 6 Vict. c. 45, s. 22.

(*a*) *Russell* v. *Briant*, 8 C. B. 836. 12 Law J., C. P. 33. *Lyon* v. *Knowles*, 32 Law J., Q. B. 71.

(*b*) The stat. 38 Geo. 3, c. 71, has been repealed by 24 & 25 Vict. c. 101, sched.

pirated copies, or pirated casts, without the consent of the proprietor, is provided by special action on the case, in which double costs of suit are recoverable, but the action must be brought within six calendar months after the discovery of the offence (*c*).

Piracy of useful and ornamental designs (*d*).—Penalties are recoverable by action or by summary proceedings for the piracy of registered useful or ornamental designs, or the proprietor of the design may elect to bring an action for damages; but he cannot recover both the penalties and the damages (*e*). Penalties also are recoverable for making or exposing for sale pirated copies, or pirated casts, of registered copies, drawings, prints, or descriptions in writing, or prints of pieces of sculpture, models, &c., within the protection of the sculpture copyright act, and for doing various specified things in derogation of the rights of the proprietor of the design. These penalties are given as an alternative, and not a cumulative remedy (*f*). When utility and beauty are blended together in the design, it may be registered under both the useful and the ornamental designs' acts; but if there is neither novelty nor utility in the article, it is not entitled to registration under either statute, and cannot claim any statutory protection (*g*).

A combination of old designs, forming a new and original combination, must, in order to obtain the statutory protection, be one new design, and not a mere multiplication of old designs (*h*).

The proprietor of a design duly registered loses the benefit of the acts, unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions (*i*).

Piracy of prints and engravings.—The statutes of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, vesting the sole right and liberty of printing and reprinting historical and other prints in the persons who invent and design them, or cause them to be designed and engraved from their own works and inventions, impose penalties upon all persons who engrave, etch, or in any manner copy and sell, in the whole or in part, by varying, adding to, or diminishing from, the main design, any historical or other print engraved with the name of the proprietor on each plate, and printed on every such print, &c. (*k*), or print, reprint, or import for sale, &c., any such print, without the written consent of the proprietor attested as

(*c*) 54 Geo. 3, c. 56. ss. 3, 4.

(*d*) *Millingen* v. *Picken*, 1 C. B. 799. 14 Law J., C. P. 254. *Reg.* v. *Bessel*, 16 Q. B. 810.

(*e*) 5 & 6 Vict. c. 100, ss. 8, 9; 6 & 7 Vict. c. 65; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73. As to registration, *Heywood* v. *Potter*, 1 Ell. & Bl. 439; 22 Law J., Q. B. 133. *Rogers* v. *Driver*, 16 Q. B. 102. 20 Law J., Q. B. 31.

(*f*) 13 & 14 Vict. c. 104, s. 7; 21 & 22 Vict. c. 70, s. 7.

(*g*) *Windover* v. *Smith*, 9 Jur. N. S. 397.

(*h*) *Norton* v. *Nicholls*, 1 Ell. & Ell. 761. *Harrison* v. *Taylor*, 3 H. & N. 301; 27 Law J., Exch. 315.

(*i*) *Sarazin* v. *Hamel*, 32 Law J., Ch. 380.

(*k*) *Colnaghi* v. *Ward*, 12 Law J., Q. B. 1.

therein mentioned, or publish, sell, &c., without such consent. These penalties are cumulative upon the right of action (*l*), but the provision as to double costs of suit has been repealed (*m*), and the proceedings must be instituted within the time limited by the statutes (*n*).

The copying of prints and engravings by photography is within the mischief intended to be provided against (*o*), and so is the selling of a copy with colourable variations (*p*).

Books containing designs and prints which are mere illustrations of the letter-press, are protected by 5 & 6 Vict. c. 45 (*q*).

The statute 8 Geo. 2, c. 13, made it necessary to prove knowledge in proceedings against a person for selling a pirated engraving or print. The 17 Geo. 3, c. 57, which was passed to amend the former act, omits the word "knowingly," and enables the person having a copyright in a print or engraving to maintain an action against persons found selling pirated copies of it, without proof of guilty knowledge (*r*).

Infringement of copyright in paintings, drawings, and photographs.— By 25 & 26 Vict. c. 68, conferring upon the authors of paintings, drawings, and photographs, the sole and exclusive right, for a certain term, of copying, engraving, reproducing, and multiplying them, and the designs thereof, and photographs, and the negatives thereof, penalties are imposed upon persons who repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause to be repeated, &c., any painting, drawing, or photograph, in which there shall be subsisting copyright, without the consent of the proprietor of the copyright; also for knowingly importing, selling, &c., repetitions, copies, &c., unlawfully made; also for fraudulently affixing names, &c., to any painting, drawing, or photograph, and doing various other specified things in derogation of the rights of the owner of the copyright. All these penalties are cumulative upon the remedy by action. They are cumulative also upon any remedy which any person aggrieved may be entitled to, either at law or in equity (*s*).

Registration of the proprietorship of the copyright is made a condition precedent to the maintenance of any action, and the recovery of any penalties under the statute.

Proof of the copyright.— When any painting or drawing, or the negative of any photograph, is sold or disposed of, for the first time, or is made or executed for any other person, for good consideration, the person selling or disposing of, or making or executing the same, cannot retain

(*l*) 17 Geo. 3, c. 57.
(*m*) 24 & 25 Vict. c. 101, sched.
(*n*) 8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38, ss. 2–8.
(*o*) *Gambart* v. *Ball*, 32 Law J., C. P. 166; 8 Law T. R., N. S., C. P. 428.
(*p*) *West* v. *Francis*, 5 B. & Ald. 742.
(*q*) Ante p. 36. *Bogue* v. *Houlston*, 5 De G. & S. 273; 21 Law J., Ch. 470.
(*r*) *Gambart* v. *Sumner*, 5 H. & N. 8; 29 Law J., Exch. 98.
(*s*) 25 & 26 Vict. c. 68, s. 11. As to the remedy by Injunction, see post, ch. 23.

the copyright thereof, unless it is expressly reserved to him by agreement in writing, by the vendee, or assignee, of the painting, or drawing, or negative, or the person for whom it has been executed; nor can the vendee or assignee claim the copyright, except by virtue of an agreement in writing, signed by the person selling or disposing of the same, or by his duly authorized agent (*t*).

Penalties for the use of counterfeit trade marks and false descriptions of articles of manufacture and sale are imposed by 25 & 26 Vict. c. 88, s. 4, and are cumulative (s. 11) upon any remedy which aggrieved parties may be entitled to, either at law or in equity.

Penalties for the commission of nuisances are also cumulative upon the common-law remedy by action; such as penalties for causing water to be corrupted by gas washings or gas refuse, and the creation of preventible nuisances in the exercise of noxious trades (*u*), fouling the water of wells, fountains, or pumps (*x*), wilfully and knowingly turning out upon any forest, common, waste, open field, or unenclosed land, &c., sheep or lambs infected with the diseases therein mentioned, or knowingly exposing or offering for sale, or attempting to sell, sheep, lambs, and cattle, in some market, fair, or public place, infected with certain contagious or infectious disorders, or horses infected with glanders (*y*).

Statutory benefits and burthens.— A person who seeks for and accepts some statutory benefit to which a burthen is attached, cannot take the benefit and reject the burthen. Where, therefore, the king, for the benefit of the public, has made a grant of any property, benefit, right, or privilege, imposing at the same time certain public duties or obligations, and the grant has been accepted, the public may enforce the performance of the duty by indictment, and individuals peculiarly injured by action (*z*). When statutory powers and authorities are granted by permissive words, they are permissive only so long as the benefits they confer are not taken under them, for as soon as the grantee takes the advantage of the statute, and acts on their powers, he takes all the burdens attached by those acts to the benefits, and is liable to an action at the suit of any person who has sustained special damage by the non-performance of the statutory duty (*a*).

Where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, an action is not maintainable upon the statute for the recovery of any remuneration (*b*).

(*t*) 25 & 26 Vict. c. 68, ss. 1–3.

(*u*) 18 & 19 Vict. c. 121, ss. 23, 25, 27; 10 & 11 Vict. c. 15, ss. 21–23. As to penalties for newly establishing noxious trades without the consent of local boards of health, 11 & 12 Vict. c. 63, s. 64; and as to what are noxious trades within the meaning of the statute, see *Wanstead Local Board* v. *Hill*, 13 C. B., N. S. 479; 32 Law J., M. C. 135.

(*x*) 23 & 24 Vict. c. 77, s. 8.

(*y*) 38 Geo. 3, c. 65, s. 1; 11 & 12 Vict. c. 107, s. 1; 16 & 17 Vict. c. 62; 21 & 22 Vict. c. 62.

(*z*) *Lyme Regis* (*Mayor of*) v. *Henley*, 1 Bing. N. C. 222; 2 Cl. & Fin. 331.

(*a*) *Nicholl* v. *Allen*, 1 B & S. 916; 31 Law J., Q. B. 283; ante, p. 34.

(*b*) *Jones* v. *Carmarthen* (*Mayor of, &c.*) 8 M. & W. 605.

CHAPTER II.

OF INFRINGEMENTS UPON RIGHTS NATURALLY INCIDENT TO THE POSSESSION AND OWNERSHIP OF LAND.

SECTION I.—*Of the right and burthen of natural servitude.*—Torts arising from disturbance of rights of servitude—Natural and necessary servitudes—Dominant and servient tenements—Prædial and urban servitudes—Servitudes accessorial to the drainage of lands—Of the natural servitude of support from adjoining lands—Mutual rights and duties of separate owners of the surface and subsoil—Abridgement of the right and servitude of support by express contract—Transfer of natural servitudes—Torts arising from the diversion of running water—Diversion of water for purposes of irrigation and drainage—Effect of acquiescence in the unlawful diversion of water—Of the right to pen back water—Injuries from the defilement of streams—Disturbance of the permissive use and enjoyment of water—Right to well water—Statutory interest of navigation companies in the water of navigable rivers.

SECTION II.—*Of the remedy by action and by injunction for infringements of rights incident to the possession and ownership of land.*—Direct and consequential injuries—Parties to be made plaintiffs—Tenant and reversioner—Parties to be defendants—Declaration of the cause of action—Pleadings—Defences—Evidence—Damages—Apportionment of damages as between tenant and reversioner—Injunction to prevent the disturbance of rights incident to the possession and ownership of land—Jurisdiction of the court of Chancery to prevent infringements of legal rights—Injunction to restrain the diversion of water—Injunction to prevent obstruction to the repair of a watercourse *in alieno solo*.

SECTION I.

OF THE RIGHT AND BURTHEN OF NATURAL SERVITUDE.

Torts arising from disturbance of rights of servitude.—We have already seen that every invasion of a man's legal right constitutes a tort or civil wrong, in respect of which, compensation in damages is recoverable (ante, p. 7); and one of the most interesting and important branches of the law of torts is the law regulating the rights, duties, and responsibilities of neighbouring landowners, in respect of the use and enjoyment of their respective properties.

Natural and necessary servitudes.—The unrestricted ownership of property naturally carries with it a right to do whatever the owner pleases with

his property, without regard to the question whether what he does tends to the injury of another or not; but the common interests of mankind require certain restrictions to be placed upon this freedom of ownership, to prevent one proprietor from so using and managing his property as to render it a source of injury and annoyance to another. Thus, it is impossible for landed property to be beneficially occupied and enjoyed unless one landowner, or occupier, is prevented from damming up or diverting the natural streams and watercourses on his land, and thereby depriving his neighbour of water, which would otherwise naturally flow to him. Neither could land be usefully and beneficially cultivated or enjoyed if one man was allowed to dig pits, mines, or quarries, so near to the boundary of his estate, that his neighbour's land, being deprived of its natural support, would slide down and sink into the hollow (*c*).

Every landed estate, therefore, is burthened with a certain duty or service, which it is bound by law to render to the adjoining property. In the Roman law this service was denominated a servitude — a term used to denote both the right and the obligation (*d*). The Roman servitude was either affirmative or negative. The affirmative servitude bound the proprietor to suffer something to be done on his own land for the benefit of the adjoining estate. The passive servitude merely required him to refrain from doing something, which, if done, would be injurious to his neighbour.

Dominant and servient tenements.—The land on which the burthen was imposed was called the servient tenement, and the estate or property which had the right to the servitude was called the dominant tenement. The existence of the benefit in favour of one property, and the burthen thereby imposed upon another, depended upon the lands being so situate as to render it a necessary adjunct to the beneficial use and enjoyment of the dominant tenement; and the exercise of the right of servitude was confined to what was reasonable and necessary for such enjoyment, and merely accessorial thereto.

Prædial and urban servitudes.—Servitudes amongst the Romans were further divided into prædial and urban servitudes. The term "prædial servitude" was used to denote the burthen imposed upon one field, or parcel of cultivated ground, in favour of the use and enjoyment of another adjoining piece of cultivated land; whilst the term "urban servitude" was applied to the burthens imposed upon houses and buildings, whether situate in town or country. In the Roman law, through the operation

(*c*) *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 659.

(*d*) Item a jure imponitur servitus prædiorum vicinorum: scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur; item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte. Bracton, lib. 4, fol. 221.

of urban servitudes, one neighbour might be permitted to place a beam upon the wall of another; or might be compelled to receive the droppings and currents from the gutter-pipes of another's man's house upon his own house, area, or sewer; or might be exempted from receiving them; or restrained from raising his house in height, lest he should darken the habitation of his neighbour (*e*). But our own law does not impose any such burthen, *ex jure naturæ*, upon adjoining proprietors; but the servitude may be established by contract, grant, or prescription (post, ch. 3).

There are, therefore, two principal classes of servitudes in our law: viz. natural servitudes, which are derived from the situation of places, and are a necessary and natural adjunct to the properties to which they are annexed; and conventional servitudes, which are founded on contract, and are established by grant or prescription (post, ch. 3).

The right and burthen of natural servitude are contemporaneous with the right of property itself (*f*).

Natural and necessary servitudes accessorial to the drainage of land.—Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighbouring lands. All lands, therefore, are of necessity burthened with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher lands to the natural outfall and drainage of the soil, unless he has gained a right to pen back water by contract, grant, or prescription, in the manner presently pointed out (post, p. 50) (*g*). So if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain-water together at the boundary of his estate, and pours it in a concentrated form, and in unnatural quantities, upon the land below, he will be responsible for all damage thereby caused to the possessor of the lower lands (*h*).

Every landed proprietor has, *ex jure naturæ*, a right to the continued flow of natural streams and rivulets running through his land, and a right to the reasonable use of the water of such streams. Lands, therefore, through which a natural stream flows, are burthened with the servitude of receiving and transmitting the waters of the stream to the lower land; and the possessor of the land, through which the stream

(*e*) Instit. lib. 2, tit. 3, s. 1.
(*f*) Pardessus, Tr. des Serv. Introduction, 1.
(*g*) *Shury* v. *Piggot*, 3 Bulstr. 340. *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 Law J., Exch. 81; 5 Jur. N. S. 877; Dig. lib. 39, tit. 3.
(*h*) *Sharpe* v. *Hancock*, 8 Sc. N. R. 46.

runs, is clothed with the duty of keeping the channel and bed thereof free from artificial and unnatural obstructions.

In the Roman law, we find that every proprietor of land is enjoined to refrain from doing anything on his land to impede the natural flow of water from the high land to the land below, whilst the proprietor of the higher land is prohibited from sending, by means of artificial contrivances, larger quantities of water on to the lower land than would naturally flow there, or altering the course of streams and giving a new direction to the surface water, to the prejudice of the proprietor of the lower land (*i*).

In the Code Napoléon, under the head of "*Servitudes derived from the Situation of Places*," we read, that "All lower lands are subjected, as regards those which are higher, to receive the waters which flow naturally therefrom, to which the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall prevent such flowing, nor can the superior proprietor of the higher lands do anything to increase the servitude of the lower lands" (*k*).

Statutory powers for the improvement of the drainage of lands for agricultural purposes have recently been conceded or extended to various drainage boards, or public bodies facilitating the removal of weirs, dams, and obstructions in streams and rivers, and the granting of compensation to the owners of them; the deepening, cleansing, repairing, and maintaining watercourses or outfalls for water, and walls and defences against the inroads of water, and the making and maintaining of new drains, watercourses, and outfalls (*l*).

Of the natural servitude of support from adjoining lands.—Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state, not weighted by walls or buildings (*m*). If the land has been weighted by superstructures, the landowner who has thus weighted his land is not entitled, *ex jure naturæ*, to the additional support from his neighbour's soil, necessary for the maintenance of the buildings, for one landowner cannot, by altering the natural condition of his land by erecting buildings thereon, deprive his neighbour of the privilege of using his land, as he might have done before (*n*). But where the houses are ancient, and the additional support required by them has been enjoyed for twenty years, the owner will, in general, have acquired a right to the continued enjoyment of such additional support (*o*).

(*i*) Pardessus, part 2, ch. i. s. 1. Obligations qui concernent les eaux. Dig. lib. 8, De Servitutibus.

(*k*) Cod. Nap. No. 640–642.

(*l*) 24 & 25 Vict. c. 133.

(*m*) *Humphries* v. *Brogden*, 12 Q. B. 744. *Solomon* v. *Vintners' Company*, 4 H. & N. 585; 28 Law J., Exch. 370.

(*n*) *Wyatt* v. *Harrison*, 3 B. & Ad. 875. *Partridge* v. *Scott*, 3 M. & W. 220.

(*o*) *Hunt* v. *Peake*, 1 Johns. 710; 29 Law J., Ch. 785.

In an old case in Roll's "Abridgement," it is said, that "if A be seised in fee of copyhold land closely adjoining the land of B, and A erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A, but not in the land of A, that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A against B, inasmuch as it was the fault of A himself that he built his house so near the land of B, for he cannot by his own act prevent B from making the best use of his land that he can: but it seems, that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie" (*p*).

If a man digs a well on his own land so close to the soil of his neighbour as to require the support of a rib of clay or stone in his neighbour's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone which is his own property, and thereby letting out the water, unless a prescriptive right to the use of the water has been gained by twenty years' uninterrupted enjoyment (*q*).

Of the natural servitude of support from the subsoil to the surface of land, when the surface and subsoil constitute separate freeholds vested in different proprietors—Mutual rights and duties of separate owners of the surface and subsoil.—The possession of the surface of land may be in one man and the subsoil in another, by separate grants from the owner of the inheritance; or the owner may grant the surface to another to be cultivated and enjoyed, reserving to himself a right to the subsoil, and to all stones and minerals beneath the surface. When land is so held each proprietor is possessed of a "close," and has a separate and distinct freehold. If the owner of land grants the subsoil, reserving the surface to himself, he impliedly grants reasonable means of access to the subsoil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the subsoil, if he had no other means of access thereto. But the owner of the subsoil may maintain an action against the owner of the surface if he digs holes in the subsoil to a greater extent than is reasonably necessary for the proper and fair use, cultivation, and enjoyment of the surface (*r*); and the owner of the surface may, on the other hand, maintain an action against the owner of the subsoil if the latter carries on his mining and subterranean operations so as to interfere with the fair use and enjoyment of the surface in accordance with the ancient maxims,

(*p*) *Wilde* v. *Minsterley*, 2 Roll. Abr. 565.

(*q*) Tindal, C. J., *Acton* v. *Blundell*, 12 M. & W. 353. *Reg.* v. *Metrop. Board*, 32 Law J., Q. B. 110; post, ch. 3.

(*r*) *Cox* v. *Glue*, 12 Jur. 185; 5 C. B. 551.

"prohibetur ne quis faciat in suo quod nocere possit alieno," and, "sic utere tuo ut alienum non lædas" (*s*).

The owner of the surface, therefore, is entitled of common right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them without leaving support sufficient to maintain the surface in its natural state (*t*). This is a rule of law founded on natural justice, and is a restraint on the exercise of dominion over property essential to the beneficial occupation and enjoyment of the soil. If land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to the additional support necessary for the maintenance of the buildings until he has acquired the right by grant or prescription (post, ch. 3); so that if the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been placed upon it, the owner of the subsoil is not responsible for the damage done (*u*). But if the weight of the buildings has in no way caused the sinking of the land, and the land would have fallen in whether buildings had been erected on it or not, the building on the land becomes quite immaterial, and the defendant is responsible in damages to the extent of the injury done to both houses and land (*v*).

Upon every demise of mineral or other subjacent strata the lessor impliedly retains his right of support from the subsoil to the surface, in the absence of express words showing distinctly that he has waived or qualified his right (*x*).

If the owner of the subsoil excavates it without leaving proper support for the owner of the surface, the latter has no right of action until some actual damage has been sustained by him. "If that were not so, the owner of the subjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action; though, before any damage had actually occurred he had, by substituting other means of support, removed all danger of injury to the plaintiff's property. This would be wholly inconsistent with the right of the proprietor to use his property as he pleases, provided he does not injure that of his neighbour" (*y*).

(*s*) *Wilkinson* v. *Proud*, 11 M. & W. 33. *Rowbotham* v. *Wilson*, 8 Ell. & Bl. 142; 8 H. L. C. 359; 30 Law J., Q. B. 965.

(*t*) *Humphries* v. *Brogden*, 12 Q. B. 739; 28 Law J., Q. B. 10. *Smart* v. *Morton*, 5 Ell. & Bl. 47; 24 Law J., Q. B. 260. *Roberts* v. *Haines*, 27 ib. Exch. 49.

(*u*) *Backhouse* v. *Bonomi*, 9 H. L. C.; 7 Jur. N. S. 809; affirming *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 622; 28 Law J., Q. B. 378.

(*v*) *Brown* v. *Robins*, 4 H. & N. 191; 28 Law J., Exch. 250. *Rogers* v. *Taylor*, 2 H. & N. 828; 27 Law J., Exch. 175. *Hamer* v. *Knowles*, 6 H. & N. 454; 30 Law J., Exch. 102. *Hunt* v. *Peake*, 1 Johns. 712; 29 Law J., Ch. 785.

(*x*) *Dugdale* v. *Robertson*, 5 Kay & J 700.

(*y*) Per Wightman, J., *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 637; 27 Law J., Q. B. 387; affirmed ib. 655, 380.

Abridgement of the right and servitude of support by express contract.—If the owner of land with subjacent mines grants away the mines, together with the power of raising the minerals, without regard to any injury done thereby to the surface, such a grant would, it seems, be good, and would bind the inheritance, and his estate in the surface would pass to his assigns, abridged to that extent of the right of support from the minerals. Hence it seems to follow, that it is competent for the owner of the surface of land effectually to curtail by grant, in favour of the owner of subjacent mines, the right to support therefrom (*z*).

In the Roman law, under the head of legal restrictions upon rights of property, we find that no proprietor of land was permitted to excavate on his own land so as to endanger his neighbour's building; but that every man erecting a new building was bound to place the new structure a certain distance from his neighbour's boundary.

Transfer of natural servitudes.—Natural servitudes derived from the situation of places are regarded as appurtenant to the lands for whose benefit they exist, so that they cannot be alienated from the land, and cannot be transferred from one person to another as benefits and privileges in gross. Being annexed to the land itself, the right to exercise them passes with the land to every owner and possessor of the dominant tenement.

Torts arising from the diversion of running water.—Every landed proprietor has a right to use the water of a natural stream flowing along his land for any reasonable purpose of his own, not inconsistent with a similar right in the proprietors of the land above and below; he cannot seriously diminish the quantity nor deteriorate the quality of the water which would otherwise descend, if by so doing he deprives another riparian proprietor of the beneficial use of the water, unless he has gained a title, by grant or prescription, so to use the water (*a*). But an artificial rivulet created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream, and the proprietor on the banks of the natural stream will have no right of action for the diversion of that water (*b*).

A right to the use and enjoyment of a natural watercourse and water is not affected by reason of the supply of water being uncertain and precarious, and dependent upon the dryness or humidity of the seasons. The intervention of a single dry season or of a series of dry seasons, cutting off all the water for a shorter or a longer period, cannot deprive a party of his right to the water when it reappears again in its ancient channel. Where a natural stream meandered down a lane before it

(*z*) *Rowbotham* v. *Wilson*, 8 Ell. & Bl. 123; 27 Law J., Q. B. 64; 8 H. L. C. 359; 30 Law J., Q. B. 965.

(*a*) *Embrey* v. *Owen*, 6 Exch. 370. *Mason* v. *Hill*, 5 B. & Ad. 13. *Chasemore* v. *Richards*, 5 Jur. N. S. 873; H. L., 33 Law T. R. 353.

(*b*) *Wood* v. *Waud*, 3 Exch. 779.

entered the plaintiff's land, and the plaintiff varied the ancient channel, by making a straight cut across the road to his own premises, it was held that his right to the water was not affected by the obliteration of the natural channel, and the making of the new watercourse (*c*).

Diversion of water for purposes of irrigation and drainage.—If a man places a temporary bar or weir across a stream in order to turn it into his own land for purposes of irrigation, and by that means seriously diminishes the current to the prejudice of a riparian proprietor lower down the stream, it is no answer to an action by the latter for damages to set up that the water was only temporarily arrested by the defendant for the purpose of enabling him to irrigate his land (*d*). The right of the possessor of land through which a natural stream flows to use the water of the stream for irrigation and for manufacturing purposes, depends upon the particular circumstances of each case, upon the volume of the stream, the extent of the loss of water from evaporation or absorption, and the amount of injury inflicted thereby upon other riparian proprietors. "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water; and, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application" (*e*).

In the case of casual and intermittent surface-waters not running in any defined channel, but spreading themselves over the surface of the land, there is nothing to prevent the landowner from dealing with them as he pleases (*f*), but he must not divert the perennial supply of water from a spring-head, or prevent it from flowing by a natural channel to the lands below (*g*). He has no right by any system of artificial drainage to cut off the natural visible supply of surface-water from ancient watercourses and rivulets; and he ought so to arrange his drains as to restore the water at the boundary of his estate to its ancient channels, that the lands situate on a lower level may not be deprived of their natural supply of the precious element, for a man has no right, as we

(*c*) *Hall* v. *Swift*, 6 Sc. 169. Dig. lib. 8, tit. 3, l. 35.

(*d*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 612.

(*e*) *Embrey* v. *Owen*, 6 Exch. 372. *Miner* v. *Gilmour*, 12 Moore, P. C. C. 156. *Norbury* (*Lord*) v. *Kitchin*, 9 Jur. N. S. 132.

(*f*) *Broadbent* v. *Ramsbotham*, 11 Exch. 617; 25 Law J., Exch. 115.

(*g*) *Ennor* v. *Barwell*, 2 Giff. 424; 4 Law T. R., N. S. 597. *Brown* v. *Best*, 1 Wils. 174. *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; 26 Law J., Exch. 146.

have seen, to make improvements on his land, which produce injury to his neighbour (*h*).

By the French law, the proprietor of a field in which a spring rises or through which it flows, is not entitled to take and appropriate to his own use the whole of the water, or divert it from other proprietors of lower fields through which the water flows. He cannot change the course of the stream, or materially diminish the ancient supply of water; but every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and when his estate is intersected by such water, he may divert it for purposes of irrigation, on condition that he restores it at the boundary of his property to its ordinary channel; and in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals (*i*).

A sort of statutory property and interest in the water of a navigable river is sometimes vested by act of parliament in navigation companies, enabling them to prevent so large an abstraction of the water as would be injurious to the navigation (*k*).

Effect of acquiescence in the unlawful diversion of water from a running stream.—If a portion of a natural stream has been unlawfully diverted for the supply of a mill, causing an injurious diminution in the flow of water to the proprietors lower down the stream, these last must interrupt the unlawful enjoyment of the diverted water by taking legal proceedings against the wrong-doer, in order to prevent the injurious act from being eventually converted into a right (post, ch. 3). If the wrong-doer is convicted and fined, or a verdict is obtained against him in an action, the conviction and record of the proceedings show conclusively that the enjoyment was interrupted, and that there was no acquiescence in the unlawful use of the water (*l*).

Of the right to pen back water.—A landowner may put a penstock on his own grounds, and pen the water there as he will, until he has done damage to his neighbour. "Until you prejudice your neighbour by penning back the water, you do that which you have a right to do: but where you begin to injure your neighbour, there your right to pen back terminates" (*m*), unless you have penned back under a title by grant or prescription (post, ch. 3). No action will lie for diverting or throwing back the water, except by a person who sustains actual injury therefrom (*n*). But the party by or over whose land the stream passes, must

(*h*) *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250; ante, p. 3.

(*i*) Cod. Nap. liv. 2, No. 640–645.

(*k*) *Mcd. Nav. Co.* v. *Earl of Romney*, 9 C. B., N. S. 575; 31 Law J., C. P. 236.

(*l*) *Eaton* v. *Swansea Water Co.*, 17 Q. B., 267.

(*m*) Lawrence, J., *Cooper* v. *Barber*, 3 Taunt. 108.

(*n*) *Wright* v. *Howard*, 1 Sim. & Stu. 203. *Williams* v. *Morland*, 2 B. & C. 910.

not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the prejudice of his neighbour. The just and equitable principle is given in the Roman law: "Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat" (*o*). If the user by the defendant has been beyond his natural right, and is injurious to the natural rights of the plaintiff, an action is maintainable, unless the user is sanctioned by grant or prescription (*p*).

Injuries from the defilement of streams.—Every riparian proprietor has a right to the flow of the stream through his land in its natural purity; and if a riparian proprietor higher up the stream throws dirt and ashes, or gas refuse into it, so as to defile the water and render it unfit for use, to the damage of another riparian proprietor who has been in the habit of using the water, an action is maintainable for the injury (*q*), unless an adverse right has become vested in another by grant or prescription. A right to foul a stream with all sorts of refuse may, as we shall presently see, be established by proof of the continued and uninterrupted use of the stream as a drain and sewer for twenty years (*r*).

Disturbance of the permissive use and enjoyment of water.—A landowner or occupier of a house who receives permission from an adjoining landowner to draw water from the premises of the latter through a pipe or watercourse, is entitled to an action for damages if the water is fouled by a wrong-doer, and damage is sustained by him from the fouling of the water. Though there may be no right on the part of a plaintiff to have water flow to his premises, yet if the water does come, and the defendant fouls it without having any right so to do, and so causes foul water to flow into the plaintiff's premises, and the plaintiff sustains damage therefrom, and the defendant cannot justify, the plaintiff will be entitled to recover all the damage he has sustained from the wrongful act. The plaintiff in such a case relies upon no title to the water as a riparian proprietor, but merely alleges that he was lawfully in the enjoyment and use of water flowing through his premises in a pure and unpolluted state, and that the defendant wrongfully fouled it (*s*).

Of the right of landowners to well-water.—The right to the enjoyment of the water of a stream flowing in its natural course over the surface of land, and the right to underground water and springs beneath the surface, are not governed by the same rules of law. It has been held that a landowner has a right to sink a well in his own land, and get as much

(*o*) Parke, B., *Embrey* v. *Owen*, 6 Exch. 371.

(*p*) *Sampson* v. *Hoddinott*, 1 C. B., N S. 612; post, ch. 3.

(*q*) *Murgatroyd* v *Robinson*, 7 Ell. & Bl. 391; 26 Law J., Q. B. 233; post, ch. 4, s. 1. NUISANCES.

(*r*) Post, chs. 3, 4.

(*s*) *Laing* v. *Whaley*, 3 H. & N. 685, affirming *Whaley* v. *Laing*, 2 H. & N. 476.

water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land, to enable him to get back the water (*t*). A landowner who has sunk a well in his own land, and thereby enjoyed the benefit of underground water, has no right of action against a neighbouring proprietor who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry (*u*).

The use and consumption of the water from wells is not confined to the reasonable wants of the occupiers of the land in which the well is sunk, nor restrained by any consideration for the wants and necessities of others. Where the defendant sunk a well seventy-four feet in depth in his own land, adjoining the source of an important river, which supplied water to various mills and manufactories, and pumped water from this well for the supply of a neighbouring town, at the rate of half-a-million of gallons a-day and upwards, and by this means obviously interrupted a great deal of water which would have otherwise found its way into the river, and so diminished the volume of water in the river, and prevented the millowners from working their mills full time, it was held that the landowner had not exceeded his natural rights, and that the millowners had no remedy for the injury they had sustained (*x*). A distinction, however, ought in reason and justice to be made between the diversion of water from the ancient sources of springs, and natural water-courses, and running streams, and the diversion of water from an artificial well. If one man sinks a well in his land to get water, another landowner has an equal natural right to do the same; and if one well is drained dry by the digging of another, the mischief may be remedied by deepening the dry well; but the riparian proprietors of a natural stream which has been drained dry by the sinking of wells and shafts, and the pumping away of all the water from the subterranean sources of supply, have no means whatever of counteracting the mischief, and getting back any portion of the diverted water. Here the maxim, "Sic utere tuo ut alienum non lædas," appears to be rejected by our law.

Of the flooding of lands from artificial collections of underground water.—Where the owner of a coal-field excavated his coal, and in so doing left large hollows, which filled with water, and then, when the adjoining landowner proceeded to work his coal, the subterranean water

(*t*) *Chasemore* v. *Richards*, 7 H. L. C. 349; 26 Law J., Exch. 401; 5 Jur. N. S. 878. *Reg.* v. *Metrop. Board, &c.*, 32 Law J., Q. B. 105; 8 Law T. R., N. S. 238.

(*u*) *Acton* v. *Blundell*, 12 M. & W. 324. So by the Pandects, "Cum eo qui in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo actionem et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit."—Lib. 39, tit. 3, l. 12. Domat. Liv. 2, tit. 8, s. 1.

(*x*) *Chasemore* v. *Richards*, ut sup.

from the hollows flowed into his workings and flooded them, it was held that he had no right of action for the damage (*y*).

Statutory property and interest of navigation companies in the water of a navigable river.— Acts of parliament incorporating companies for the purpose of rendering rivers navigable, and purporting to vest in the company the river or stream to be made navigable, vest in the company much more extensive rights over the water of the stream than those which the common law gives to riparian proprietors. They create a new species of statutory property and interest in the water, which renders any abstraction of it unlawful, except it be by a riparian proprietor for his necessary purposes, although no actual damage may be done to the navigation (*z*). But navigation companies and canal companies have no power of granting any exclusive right of sailing upon or navigating a river or canal beyond what is expressly given to them by statute. And, therefore, where a canal company, by deed, granted to the plaintiff "the sole and exclusive right or liberty to put pleasure-boats on the canal, and let them out for hire, for purposes of pleasure only," it was held that the canal company had no power to grant any such exclusive privilege (*a*).

SECTION II.

OF THE REMEDY BY ACTION AND BY INJUNCTION FOR INFRINGEMENTS OF RIGHTS INCIDENT TO THE POSSESSION AND OWNERSHIP OF LAND.

Direct and consequential injuries.—If the injury of which the plaintiff complains has been committed by the defendant upon land in the actual possession and occupation of the plaintiff, and is consequently the result of a direct act of trespass, the plaintiff should bring his action and frame his proceedings for a trespass upon his land (post, ch. 5). If the injury results from something done by the defendant on his own land, which is unlawful only in respect of the consequential injury thereby occasioned to the plaintiff, the action must be brought for the consequential injury, and not for a trespass, and proof of actual substantial damage is essential to the cause of action.

Parties to be made plaintiffs — Tenant and reversioner.— The actual occupier of the land is in general the proper party to maintain an action

(*y*) *Smith* v. *Kenrick*, 7 C. B. 565.
(*z*) *The Medway Co.* v. *Earl of Romney*, 9 C. B., N. S. 575; 30 Law J., C. P. 236.
(*a*) *Hill* v. *Tupper*, 9 Jur. N. S. 725.

for wrongful acts of a temporary character interfering with the beneficial use and enjoyment of the property, and diminishing the value of his possessory interest. If the injury is of a permanent nature, causing damage to the inheritance, then the reversioner is also entitled to maintain an action in respect thereof. Thus, if A is seised in fee of the reversion of a close, expectant upon a term for years, and B is possessed of another close adjoining thereto, through which close there runs a rivulet, and B stops it, *per quod* the close of A is surrounded, so that the timber-trees, &c. become rotten, A, in respect of the prejudice to the reversion, and the termor, in respect of the injury to the possession, and the loss of the shade, shelter, &c. of the trees, may each have an action, and satisfaction given to one is no bar to the other (*b*). The action for injuries to reversionary estates is of comparatively modern introduction, and appears to have been substituted for the action of waste. The principle on which the action is held to be maintainable is, that although the evil might be remedied before the end of the term, yet in the meantime, if the reversioner wished to sell his interest, it would be less valuable (*c*). It is necessary, therefore, in an action by a reversioner to show a permanent injury to the property, lessening its value in the market (*d*), or an infringement upon the plaintiff's rights as landlord.

The party who sues in respect of an injury to the reversion, must be the party in whom the legal estate is vested, and not a person having a mere equitable interest as *cestui que* trust (*e*). If several parties are entitled to the reversion as joint tenants, or tenants in common, they should all be joined as plaintiffs in an action for an injury to the reversion (*f*).

Of the parties to be made defendants.—Every person who orders or authorizes an obstruction to the enjoyment of the natural rights incident to the ownership of real property, is responsible for the injury, and for all consequential damages, and so are his servants and agents, who carry into effect the orders he has given; and when several persons have been jointly concerned in the commission of the wrongful act, they may all be made defendants and charged as principals, or the plaintiff may sue one or more of them at his election (*g*).

Of the plaintiff's declaration of his cause of action — Venue.—The venue or statement in the margin of the declaration of the name of the county from whence the jury are to be summoned, and where the cause of action is to be tried, is local in all actions for infringements of territorial rights annexed to lands or tenements, so that the cause of action must be laid

(*b*) *Bedingfield* v. *Onslow*, 3 Lev. 209. And see post, ch. 3, s. 2, ch. 5.
(*c*) *Jesser* v. *Gifford*, 4 Burr. 2141.
(*d*) *Jackson* v. *Pesked*, 1 M. & S. 234.
(*e*) *Vallance* v. *Savage*, 7 Bing. 599.
(*f*) Bac. Abr. JOINT TENANTS, K. And see further, post, ch. 19, as to the joinder of parties to actions *ex delicto*.
(*g*) Post, ch. 19.

and tried in the county in which it arose, unless a judge's order is obtained for changing the venue and place of trial. The nature of the territorial right must be set forth on the face of the declaration, and the plaintiff must claim it by reason of his possession of a messuage, tenement, or land. If the plaintiff complains of the diversion or fouling of water from a natural watercourse, he must declare upon his own possession of the place through which the water used to run, and set out the course thereof, and show the mode in which the water has been diverted, or fouled (*h*). The usual course is to set forth the plaintiff's possession of a messuage, tenement, or land, and aver that by reason of such possession, he had a right to the enjoyment of an uninterrupted flow of the water of a natural stream running in its natural bed, or flowing in its natural purity unto the messuage, tenement, or the land of the plaintiff, and that the defendant wrongfully diverted large quantities of the water of the stream, or wrongfully polluted and defiled the water thereof, showing the nature of the diversion or pollution, and alleging that the defendant thereby prevented the plaintiff from having his accustomed and proper supply of water, or deprived him of the beneficial use and enjoyment of the water, as the case may be, claiming damages.

If the plaintiff complains of an obstruction to the natural flow of the water, he should show the nature of the obstruction and the consequential damage in the flooding of the plaintiff's land, the destruction of the grass and produce of the soil, and the deposit of stone, sand, and rubbish upon the land, as the case may be, claiming damages (*i*), or, if need be, a writ of injunction against the repetition or continuance of the injury.

A declaration which alleges that the plaintiff was lawfully in the enjoyment and use of water flowing through his house and premises in a pure and unpolluted state, and that the defendant wrongfully fouled and defiled the water by pouring into it the refuse of certain chemical works, whereby the plaintiff was deprived of the use of the water, and his property was deteriorated in value, seems to disclose a good cause of action (*k*).

Declarations for infringements of the natural right to support from adjoining land.—If injury has been done to the foundations and walls of a dwelling-house, or of buildings occupied by the plaintiff, by excavations in the soil amounting to direct acts of trespass upon the land in the plaintiff's occupation, the ordinary declaration for a trespass upon the realty (post, ch. 6, s. 2), properly describes the true cause of action. If the injury has been done by a tenant in the possession and occupation of the buildings and land under a demise from the plaintiff, the proper form of declaration is a declaration for waste (post, ch. 5, s. 2). If the surface

(*h*) *Brown* v. *Best*, 1 Wils. 174. Parke, B., *Chasemore* v. *Richards*, 7 H. L. C. 349.

(*i*) *Carlyon* v. *Lovering*, 1 H. & N. 784; 26 Law J., Exch. 251.

(*k*) *Laing* v. *Whaley*, *Whaley* v. *Laing*, ante, p. 51.

and subsoil are held by different persons, and constitute separate freeholds, and the declaration is founded on an injury to the owner of the surface by excavations made by the owners of the subsoil, depriving the surface of its natural support (ante, p. 46), it is sufficient to allege that the plaintiff was possessed of the surface of certain land, and the defendant was possessed of the subsoil, mines, and minerals, or of certain beds and strata of stone beneath such surface, and that the defendant excavated the subsoil, or dug out the minerals or stone, without leaving sufficient support for the surface, and by reason thereof the surface of the land gave way, and sank into deep holes and hollows, and became useless to the plaintiff, and certain crops growing upon the land were utterly destroyed (*l*).

A good cause of action is disclosed on the face of a declaration which alleges, that at the time of the committing of the grievance of which the plaintiff complains, the plaintiff was possessed of certain messuages, belonging to and supporting which messuages, were certain foundations which the plaintiff, by reason of his possession of his messuages, ought of right to have enjoyed for the support of such messuages, and that the defendant wrongfully dug out and destroyed the foundations of the messuages, and by reason thereof they gave way and fell to the ground, and the plaintiff was deprived of the use of them (*m*). A declaration, also, by a reversioner, setting forth, that a messuage and land, with the appurtenances, were in the respective occupations of certain persons as tenants thereof to the plaintiffs, the reversion of the said messuage, land, &c., then and still belonging to the plaintiff, and that the defendant wrongfully made divers excavations in the said land, under or near to the said messuage, without sufficiently shoring and propping up the said messuage from the effects thereof, whereby the land sank, and the foundations of the messuage, &c., gave way, and the plaintiff was injured in his reversionary estate, discloses a good cause of action (*n*).

Pleas by the defendant.—The plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement. If, therefore, the plaintiff's possession of the property alleged to have been injured by the wrongful act of the defendant, or his title thereto, or his estate or interest therein, is intended to be denied, it must be specially traversed. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration, and all matters in justification, and in confession and avoidance of the cause of action, must be specially pleaded.

Not guilty by statute.—In every case in which a defendant pleads the

(*l*) *Bibbey* v. *Carter*, 4 H. & N. 153; 28 Law J., Exch. 182. *Jeffries* v. *Williams*, 5 Exch. 792.

(*m*) *Rogers* v. *Taylor*, 2 H. & N. 829; 27 Law J., Exch. 173.

(*n*) *Bibby* v. *Carter*, ut sup.

general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he must insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the act or acts of parliament, upon which he relies for that purpose, were passed; and also the chapter and section of each of the acts, and specify whether they are public or otherwise, or the plea will be taken not to have been pleaded by virtue of any act of parliament, and such memorandum must be inserted in the margin of the issue, and of the nisi prius record (*o*).

Traverse of the right claimed by the plaintiff.—If the defendant, therefore, intends to dispute the existence of the right asserted in the declaration, he must expressly deny the right by a plea traversing the allegation or assertion of it, in the very words in which it is put forward. Thus, where the declaration states, that the plaintiff was possessed of a close, and by reason thereof was entitled to have the use and benefit of a certain stream of water, &c., and the defendant intends to dispute the right, he must by his plea assert that the plaintiff was not, by reason of the possession of the said close, entitled to have the use and benefit of the said water, &c.

Of the plea of leave and license.—If the obstruction to the enjoyment of the right has been authorized by the plaintiff, or if the act complained of has been done by his permission, the defendant must plead, that he did what is complained of by the plaintiff's leave (*p*). This plea will be supported by proof, that the plaintiff gave the defendant permission to alter the condition of his property in such a way as to interfere with the enjoyment of the right.

Under this plea it may be shown, that the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant permission to lower the banks of the stream, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, and that the banks were cut down, and the weir erected, pursuant to the permission so given (*q*). Having consented to the act, the plaintiff, and those claiming title through him, are precluded from treating the act as a wrong or injury.

Evidence at the trial—Proof on the part of the plaintiff.—If the defendant pleads that he is not guilty of the act of which the plaintiff complains, it must, of course, be proved either that it was done by his own hand, or by his orders or authority, or by his servants or agents in the course of their employment, or in following out his orders and directions (*r*). If the plaintiff's possession and incidental rights are traversed,

(*o*) Reg. Gen. Hil. Term, 1853. 1 Ell. & Bl. App.

(*p*) 15 & 16 Vict. c. 76, Sched. B., No. 44.

(*q*) *Liggins* v. *Inge*, 5 M. & P. 712; 7 Bing. 682.

(*r*) Post, ch. 20, s. 2.

the plaintiff must prove the fact of his possession of the lands or tenements to which the right claimed was incident, at the time of the commission by the defendant of the grievance of which the plaintiff complains. This may be established by the plaintiff's own testimony upon the point, or by proof of the exercise of acts of dominion, or by general user and enjoyment, or actual occupation (*s*).

Proof of seizin of lands and tenements.—An allegation in pleading that a party is seised of a messuage or land, does not necessarily import that such land is in his own occupation. If, therefore, a landlord pleads seizin in fee, and the seizin is traversed, the traverse is not supported by proof that the land is in the occupation of a tenant to whom the landlord has demised it (*t*).

Damages recoverable.—Wherever the exercise and enjoyment of a right naturally incident to the possession of land has been obstructed, substantial damages are recoverable, though no actual perceptible damage has been sustained or proved, whenever the repetition of the wrongful act, if uninterrupted and undisturbed, would lay the foundation of a legal right. A wrongful defilement of a stream is an injury to a right, in respect of which damages are recoverable, although no actual specific damage can be proved. Thus, where certain manufacturers erected works on the bank of a stream, and fouled the water with soap-suds, but no actual damage was proved to have been sustained by the plaintiff, it was held that he was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to the easement of discharging their foul water into the stream (*u*).

But when the act of which the plaintiff complains has been done by the defendant on his own land, and the constant repetition of it, however long continued, would establish no prescriptive right against the plaintiff, there is no cause of action until some substantial, perceptible damage has been sustained by the plaintiff. Proof of such damage in such a case is essential to the establishment of a cause of action. Thus, where a landowner digs in his own land, or the owner of the subsoil and minerals excavates his own freehold, there is no wrongful act, and no cause of action until it is proved that the surface of the adjoining land has sunk down, or that the walls of a neighbouring house have cracked, or the foundations thereof have been displaced, or have given way, or that some actual perceptible damage has been done to the adjoining land or tenement (*x*).

Apportionment of damages as between tenant and reversioner.—When-

(*s*) *Page* v. *Hatchett*, 8 Q. B. 593.
(*t*) *Stott* v. *Stott*, 16 East, 350.
(*u*) *Wood* v. *Waud*, 3 Exch. 772. *Rochdale Canal Co.* v. *King*, 14 Q. B. 135, 138; post, ch. 3, s. 1; ante, p. 7.
(*x*) *Bonomi* v. *Backhouse*, *Backhouse* v. *Bonomi*, ante, p. 47.

ever the enjoyment of a privilege or right annexed to the ownership or occupation of land has been obstructed by the wrongful act of the defendant, and the land to which the right or privilege is annexed is in the occupation of a lessee, damages are recoverable in respect of the injury to the residential or possessory interest of the latter, and by the landlord or reversioner in respect of the permanent injury to the inheritance (*y*). Thus, where freehold premises are let on lease, and the owners and reversioners stand in the relative positions of tenant for life, remainder in tail, and the reversion in fee, and a permanent injury has been done to the beneficial occupation and enjoyment of the property, the damages recoverable by the immediate reversioner, the tenant for life, are confined to the injury done to his life-interest (*z*). But a mere temporary impediment to a drain which is remediable, and does not cause any permanent injury to the property, does not give the reversioner any right of action for damages.

If the constant repetition of the unlawful act would form the foundation for the establishment of a prescriptive right which, when once established, would operate to the lasting injury of the inheritance, and permanently diminish the value of the property, the reversioner is, as we have seen, entitled to an action for the recovery of damages.

Injunction to prevent the disturbance of rights naturally incident to the possession and ownership of land.—The Court of Chancery has always, from the earliest period, interfered by injunction to restrain the owner of land from so dealing with his property as to prejudice or destroy the rights of his neighbour, thereby enforcing the great maxim, "Sic utere tuo ut alienum non lædas." The foundation of this jurisdiction is that head of mischief alluded to by Lord Hardwicke—that sort of material injury to the comfort and enjoyment of property which requires the application of a power to prevent, as well as remedy—an evil for which damages, more or less, would be given in an action at law (*a*). But before the plaintiff can ask for an injunction restraining the defendant from using his own land or property in a way in which he would be clearly entitled to use it, but for some dominant right on the part of the plaintiff, the latter must establish such last-named right, and show to the satisfaction of the court that it has been infringed, and that he has sustained such injury therefrom as would entitle him to a verdict in an action for damages (*b*). The court will not interfere to protect a dry, strict, legal title, merely because the legal right has been infringed. It must be shown that some actual damage has

(*y*) As to the apportionment of damages between tenants and reversioners, see post, ch. 22, s. 1.

(*z*) *Evelyn* v. *Raddish*, Holt, N. P. C. 543.

(*a*) *Att.-Gen.* v. *Nichol*, 16 Ves. 342.

(*b*) *Elmhirst* v. *Spencer*, 2 Mac. & G. 51; post, ch. 3, s. 2; ch. 4, s. 3; and ch. 23.

been done or threatened, in order to lay a ground for equitable relief (*c*).

The jurisdiction of the Court of Chancery to prevent the infringement of a legal right by the issue of an injunction, is not an original jurisdiction; it existed not for the purpose of trying the fact of the existence of the right, but for the purpose of giving effect to the legal title after its existence had been established in a court of law. A party, therefore, who came before the court in the first instance for an injunction, instead of going before the ordinary legal tribunal, was bound to show some pressing necessity for summary interference, for the court would not try upon conflicting affidavits the fact of the existence or non-existence of the legal title (*d*); nor would it interfere where the legal right was doubtful, and the nature of the alleged injury was such as not to require immediate prevention (*e*). But the practice of the court in these respects has been materially modified by the chancery amendment acts, which impose upon the Court of Chancery the obligation of adjudicating upon the legal rights of the parties before them, as well as upon their title to equitable relief (*f*).

Injunction to restrain the diversion of water.— Wherever a spring rises from the ground in one man's land, and flows therefrom into another's land, and the supply of water from the spring is constant, the court will by injunction prevent a landowner through whose land the water flows, from cutting off the supply of water to the land lower down, although the spring may flow through boggy land, and not follow any defined channel or watercourse; but if the supply is casual and intermittent, and dependent upon the rain-fall, and is mere common surface-water, the court will not interfere (*g*). When a millowner or riparian proprietor is entitled to the benefit of the natural flow of water through a mill-stream, or through a natural watercourse, the Court of Chancery will by injunction restrain the owner of the subsoil or minerals from excavating or mining beneath the stream so as to endanger the existence of the watercourse or the loss of the water; but the party seeking relief must show that some injury has actually happened, or that it will inevitably result from the prosecution of the mining operations (*h*).

Injunction to restrain a disturbance of the right to support.— Where there are separate owners of surface and subsoil, and the owner of the

(*c*) *Wandsworth Board of Works* v. *Lond. & S. W. Rail. Co.*, 31 Law J., Ch. 855.

(*d*) *Semple* v. *Lond. & Birm. Rail. Co.*, 1 Rail. Cas. 134. *White* v. *Cohen*, 1 Drew, 318. *Broadbent* v. *Imp. Gas Co.*, 26 Law J., Ch. 276; 29 ib. 377.

(*e*) *Wynstanley* v. *Lee*, 2 Swanst. 335. *Ripon (Earl)* v. *Hobart*, 3 Myl. & K. 179. *Att.-Gen.* v. *United King. Elec. Tel. Co.*, 31 Law J., Ch. 329.

(*f*) Post, ch. 23, s. 1. *Beardmore* v. *Tredwell*, 31 Law J., Ch. 893.

(*g*) *Ennor* v. *Barwell*, 2 Giff. 424; 4 Law T. R., N. S. 597. *Robinson* v. *Ld. Byron*, 1 Bro. Ch. C. 588.

(*h*) *Elwell* v. *Crowther*, 31 Law J., Ch. 763.

subsoil begins to excavate so as to deprive the owner of the surface of his natural right to the support of the subsoil (ante, p. 46), the court will interfere by injunction to prevent any further excavation of the subsoil interfering with the use and enjoyment of the surface (*i*).

Injunction to prevent obstruction to the repair of a watercourse in alieno solo.—Where a mill-stream running through the defendant's land to the plaintiff's mill, broke through its banks and made a new channel for itself through the defendant's land, and the defendant would not allow the plaintiff to come on his land to repair the river-bank without the payment of a large sum of money, and the mill came to a standstill for want of water, it was held that the plaintiff, being entitled to the use of the watercourse, was entitled to come on the defendant's land to repair the watercourse and preserve it (post, ch. 3, s. 1), and the defendant was restrained by injunction from preventing the plaintiff, his servants and workmen, from coming on his land and repairing the river-bank, and doing what was necessary to be done to restore the water to its ancient channel (*k*).

(*i*) *Hunt* v. *Peake*, 1 Johns. 708.

(*k*) *M'Swiney* v. *Haynes*, 1 Ir. Eq. Rep. 322.

CHAPTER III.

OF CONVENTIONAL AND PRESCRIPTIVE SERVITUDES — EASEMENTS AND PROFITS A PRENDRE.

SECTION I.—*Of easements and profits à prendre.*—Grants of rights of servitude —Licenses—Reservation of privileges amounting to an express grant—Implied grants of easements—Privileges and services accessorial to a principal thing granted—Ways of necessity—Necessary incidents to a right of way or watercourse—Rights of towing—Easement of support from adjoining land—Right to search for minerals under lands weighted with railways and canals—Servitude of support when houses are built together, so as to require mutual support — Separate floors vested in several proprietors—Grants of the free passage of light and air to newly-opened windows—Easements accessorial to the grant of a dwelling-house—Transfer of easements and profits — Easements and profits in gross—Licenses to search for, and carry away, minerals — Exclusive licenses — Rights claimable by custom—Manorial customs—Common appendant, appurtenant, and in gross — Cow-grasses and cattle-gates —Rights of tinbounders—Inconsistent rights of common — Servitude of maintaining and repairing sea-walls, ditches, and sluices—Customary rights of fishing—Sea-bathing—Title by prescription—Prescriptive rights founded on the presumption of a grant—The prescription act—Profits and easements claimable under it—What sort of enjoyment is essential to the gaining of a prescriptive right—Enjoyment as of right—Enjoyment over land held on lease — Prescriptive rights of way, watercourse, and use of water and streams—Prescriptive right to have fences kept up *in alieno solo*—Prescriptive right to light—Effect of unity of ownership—Interruption of enjoyment—Continuity of enjoyment—Computation of the periods of enjoyment—Rights of reversioners—Waiver and extinguishment and revival of easements—Repair of ways and watercourses.

SECTION II.—*Remedies for the infringement of incorporeal rights.*—Abatement of obstructions to the enjoyment of easements—Right to distrain beasts trespassing on commons—Actions for infringements of incorporeal rights—Parties, pleadings, defences, and evidence—Damages recoverable—Remedy by injunction—Easements granted by parol—Injunction to prevent obstructions to windows and infringements of the right to support from adjoining land.

SECTION I.

OF CONVENTIONAL AND PRESCRIPTIVE SERVITUDES—EASEMENTS AND PROFITS À PRENDRE.

Easements.—The servitudes naturally incident to the ownership and occupation of land, and the legal restrictions upon the proprietary rights

of landowners (ante, pp. 42–53), may, within certain limits, be enlarged and extended by express and implied contract, by grant, and in certain cases by custom and prescription (*l*). Thus, one proprietor may acquire by grant, or from long-continued and uninterrupted enjoyment, a right to take water from his neighbour's well, or to wash and water cattle at a neighbour's farm (*m*); a right to hang and dry clothes on lines on a neighbour's land (*n*); or to hang and dry nets thereon (*o*); or to turn the plough thereon in ploughing (*p*); or to discharge water thereon from the roofs and eaves of houses (*q*); or to have the benefit of a neighbour's fence or hedge maintained and repaired at the expense of such neighbour (*r*). A privilege or benefit of this description, unaccompanied by any profit or interest in the soil itself, is called in our law an easement, and is claimable by custom, grant, or prescription.

Profits à prendre.—A profit à prendre is a right vested in one man of entering upon the land of another, and taking therefrom a profit of the soil. It is an incorporeal right, clothing the possessor of it with an interest in land, and is claimable only by grant or by prescription. Such is the right of depasturing cattle over another's land; the right to cut therefrom and carry away turf or wood for burning within the dwelling-house; the right to dig for and carry away stone, slate, coal, and minerals; the right to shoot and sport over another's land, and carry away and consume the game killed; the right to fish in the waters of an estate or of a manor, and carry away and consume the fish taken.

Bracton, in his books of the laws and customs of England, enumerates the different servitudes with which the estate of one proprietor may be burthened for the benefit and convenience of another, such as rights of depasturing cattle, rights of common, of cutting and carrying away turf, or digging for and gathering minerals, stones, or sand, rights of way, rights of drawing water from a neighbouring well, rights of watercourse, or of a passage for water through another's land, rights of hunting thereon, rights of estover, or of cutting wood for burning in the dwelling-house, or for building, or repairs; all of which servitudes, he tells us, were originally imposed upon land by the will, or ordering, or consent of the lord, or have grown up, and have become appurtenant to property, without having been expressly constituted, through long-continued, peaceable, and uninterrupted enjoyment.

The long-continued exercise of the privilege on the one side, and the sufferance and endurance of it on the other, must not, he observes, be due

(*l*) *Fitch* v. *Rawlings*, 2 H. Bl. 393. Gale on Easements, by Willes.

(*m*) *Race* v. *Ward*, 4 Ell. & Bl. 702; 24 Law J., Q. B. 153. *Manning* v. *Wasdale*, 5 Ad. & E. 758.

(*n*) *Drewell* v. *Towler*, 3 B. & Ad. 735.

(*o*) 7 Vin. Abr. p. 183. CUSTOM, F. pl. 2.

(*p*) Ib. p. 174. CUSTOM, P. pl. 4, F. pl. 1.

(*q*) *Thomas* v. *Thomas*, 2 C. M. & R. 34.

(*r*) *Boyle* v. *Tamlin*, 6 B. & C. 338; 9 D. & R. 437.

to force or intimidation. If it has been exercised and enjoyed by stealth, or if the privilege has been sought for, and has been conceded, as a kindness and matter of favour, to be enjoyed during the good pleasure of the grantor, it will fail to create a servitude (*s*).

Unlimited claims in the nature of easements, profits, and servitudes.—There can be no prescriptive right in the nature of an easement or servitude so large as to preclude the ordinary uses of property by the owner of the lands affected by the privilege, and extinguish or destroy all the profits or produce ordinarily derivable from the soil. Therefore an unlimited claim of a right to go at all times and in all directions over every portion of a close for purposes of recreation and amusement is bad. Such an easement is claimable only by the inhabitants of particular villages over open and uninclosed village-greens and village-playgrounds, which have been immemorially dedicated to the recreation and amusement of the inhabitants of the village (*t*). Claims of a right of profit à prendre *in alieno solo* must in like manner, in order to be valid, be made with some limitation and restriction. Where, therefore, a defendant claimed a prescriptive right as the occupier of a brick-kiln, to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick-kiln, it was held that an unlimited claim and demand of this nature upon the soil of the plaintiff could not be sustained, for it would, as claimed, enable the defendant "to take all the clay, or, in other words, to take from the plaintiff the whole close" (*u*). So, a privilege claimed of taking sand without limit is bad (*x*); and so is a claim by the customary tenants of a manor having gardens, parcels of their customary tenements, to dig and carry away turf from the waste within the manor, for the improvement of their garden-walks, or for making and repairing banks and mounds of grass on their customary tenements (*y*). But a custom to dig sand and gravel in the waste for the repair of a dwelling-house, when out of repair, may be supported (*z*).

Grants of rights of servitude—Licenses.—A parol license or permission to go upon another man's land will, so long as it has not been countermanded, justify an entry upon the land; but it can confer no indefeasible right at law, and may be recalled at the pleasure of the grantor, unless the license or permission is under seal. A mere parol agreement or license for the enjoyment of a right of way over the land of the licensor or promisor, may at any time be put an end to by the latter. The locking of a gate across the way is a manifest revocation of the license, and a plain statement to every body that the way is no longer to be used. And if the

(*s*) Bract. lib. 4, fol. 220–222.
(*t*) *Dyce* v. *Lady James Hay*, 1 Macq. 305.
(*u*) *Clayton* v. *Corby*, 5 Q. B. 419, 422. *Wilkes* v. *Broadbent*, 1 Wils. 63.
(*x*) *Blewitt* v. *Tregoning*, 3 Ad. & E. 554.
(*y*) *Wilson* v. *Willes*, 7 East, 121.
(*z*) *Peppin* v. *Shakspear*, 6 T. R. 748.

license has been granted by agreement for good consideration, there will be a breach of the agreement and a claim for damages ; but no right to the enjoyment of the way unless relief can be obtained in equity (*a*). " A right of passage for waste water through an artificial drain or watercourse in another man's land, where the party claiming the right has no interest in the land through which the water flows, or ought to flow, is an incorporeal right lying in grant, and is claimable only by deed or by prescription " (*b*). Therefore a mere parol permission to cut a drain, or make a watercourse, and use it for the passage of water, may be revoked at law, and the drain or watercourse stopped up by the proprietor, who has given the permission, and through whose land the water runs (*c*). " In the case of a parol license," observes Alderson, B., " to come on my land, and there to make a watercourse for water to flow through my land, there is no valid grant of the watercourse. The license remains a mere license, capable of being revoked ; but if the license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse ; and if it did, then the license would be irrevocable " (*d*). But, in equity, a landowner who has granted to his neighbour by parol an easement to be enjoyed over his land, and the neighbour incurs expenses, with the sanction of the landowner, in constructing permanent works for the enjoyment of the privilege, the landowner will not be allowed to withdraw his consent and prevent the enjoyment of the privilege, without making compensation to the licensee (*e*). Where parties desirous of supplying a town with water, applied to the defendant for permission to make a watercourse through his land, and permission was granted by word of mouth, and the watercourse was made at considerable expense, and was enjoyed for nine years, when disputes arose and the defendant cut off the water, the Court of Chancery restrained the defendant by injunction from obstructing the flow of water, on compensation being made to him for the use of his land, such compensation to be settled by the master (*f*).

" A dispensation or license," observes Vaughan, C. J., " properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. Thus a license to hunt in a man's park, and carry away the deer killed to his own use ; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and

(*a*) *Hyde* v. *Graham*, 32 Law J., Exch. 27.

(*b*) *Hewlins* v. *Shippam*, 5 B. & C. 229.

(*c*) *Cocker* v. *Cowper*, 1 Cr. M. & R. 421. *Fentiman* v. *Smith*, 4 East, 108.

(*d*) *Wood* v. *Leadbitter*, 13 M. & W. 845. *Lee* v. *Stevenson*, El. Bl. & El. 512 ; 27 Law J., Q. B. 263.

(*e*) *Beaufort* (*Duke of*) v. *Patrick*, 17 Beav. 60. *Moreland* v. *Richardson*, 22 Beav. 596. And see post, ch. 23, INJUNCTION.

(*f*) *Devonshire* (*Duke of*) v. *Eglin*, 14 Beav. 530.

cutting down the tree ; but as to the carrying away of the deer killed and tree cut down, they are grants " (*g*).

A mere license of pleasure, such as a license to hunt over a man's land, whether made by deed or simple contract, is revocable ; but a license to hunt and carry away the game killed amounts, if under seal, to a grant, and cannot be revoked (*h*). Care, however, must be taken to distinguish between a license amounting to a grant of an easement to be exercised and enjoyed by the grantee of such license upon the grantor's land, and a license to the grantee to use his own land in a way which, but for an easement claimed thereon by the grantor, he would have had an undoubted right to use it (*i*).

Reservation of privileges amounting to an express grant.— Where a conveyance of lands contains words excepting and reserving to the grantors, their heirs and assigns, liberty to come upon the land and hunt, hawk, fish, and fowl, the clause will operate as a grant of the privilege by the party to whom the land is conveyed (*k*). Where the owner of a manor and of the demesne lands thereof, granted away the manor and all his estate and interest therein, " except and always reserved " to the grantor, his heirs and assigns, *all* the coal in any of the said lands, it was held that this reservation gave to the grantor an absolute and perpetual right in fee simple to the coals (*l*).

Implied reservation of easements.—Where the necessity of an easement is apparent upon the face of property which has been sold or granted away, there is an implied reservation of the necessary easement in favour of the vendor or grantor (*m*).

Implied grants of easements visibly appertaining to a principal thing granted, and necessary to the use and enjoyment thereof.— If a landed proprietor has annexed peculiar qualities and incidents to different parts of his estates, so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or for means of access, or for beneficial use and occupation, the qualities or incidents thus manifestly imprinted upon the property pass with the lands to which they are annexed to the grantees, as accessorial to the beneficial use and enjoyment of such lands (*n*). If one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances without the land, or sell the land without the house to another, the conduit and pipes pass with the house, because they are necessary and appendant thereto ; and the purchaser of the house shall have liberty by law to dig in the land for amending the

(*g*) *Thomas* v. *Sorrell*, Vaughan, 351.
(*h*) Bro. Abr. LICENSES.
(*i*) *Winter* v. *Brockwell*, *Liggins* v. *Inge* ; post, PAROL ABANDONMENT OF INCORPOREAL RIGHTS.
(*k*) Addison on Contracts, 5th edn. pp. 123, 124.
(*l*) *Cardigan* (*Earl of*) v. *Armitage*, 2 B. & C. 197.
(*m*) *Suffield* v. *Brown*, 2 N. R. 378.
(*n*) *Suffield* v. *Brown*, ut sup.

pipes or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. "But," by Popham, C. J., "if the lessee erect such a conduit, and afterwards the lessor during the lease sell the house to one and the land wherein the conduit is to another, and after that the lease determines, he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re-entry sells it, the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit" (*o*).

When two properties are possessed by the same owner, and there has been a severance made of one part from the other, any thing which was used and was necessary for the enjoyment of that part of the property which is granted will be considered to follow from the grant, if there are the usual words of conveyance (*p*). Where, therefore, the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains necessarily to be used for the enjoyment of the adjoining house, and that without any express reservation or grant; if that were not so, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole (*q*). If a man is possessed of a house, and there is a way necessary for the useful and convenient occupation of the house (*r*) manifestly used by the occupiers of the house, a grant or lease of the house with its appurtenances will carry with it the right to use the way (*s*). But if the way is not necessary for the beneficial use and occupation of a tenement, and there are other convenient means of access, a right of way will not pass under the word "appurtenances" (*t*). And if adjoining

(*o*) *Nicholls* v. *Chamberlain*, Cro. Jac. 121. *Brown* v. *Nicholls*, Moore, 682. *Archer* v. *Bennett*, 1 Lev. 131. *Hinchliffe* v. *Earl Kinnoul*, 5 Bing. N. C. 23. *Canham* v. *Fisk*, 2 Cr. & J. 126. *Wardle* v. *Brocklehurst*, 29 Law J., Q. B. 145.

(*p*) *Ewart* v. *Cochrane*, 4 Macq. 122; 7 Jur. N. S. 925. *Hall* v. *Lund*, 32 Law J., Exch. 113; 9 Jur. N. S. 205. *Suffield* v. *Brown*, ut sup.

(*q*) *Pyer* v. *Carter*, 1 H. & N. 916; 26 Law J., Exch. 258. *Hall* v. *Lund*, ut sup.

(*r*) Mansfield, C. J., *Morris* v. *Edgington*, 3 Taunt. 28. *Pearson* v. *Spencer*, 1 B. & S. 571; 8 Law T. R., N. S. 166.

(*s*) Pollock, C. B., *Glave* v. *Harding*, 27 Law J., Exch. 292.

(*t*) *Pheysey* v. *Vicary*, 16 M. & W. 484. *Dodd* v. *Burchall*, 1 H. & C. 113; 31 Law J., Exch. 364. *Wardle* v. *Brocklehurst*, ut sup.

houses held under the same landlord, are sold subject to all subsisting *rights* of way, a mere permissive user of a way will not thereby be converted into a legal right (*u*).

By the French law, if the proprietor of two heritages between which there exists an apparent sign of servitude disposes of one of the heritages, without making any stipulation in the conveyance respecting the servitude, it continues to exist, actively or passively, in favour of the heritage alienated or upon it (*x*). And by apparent signs of an easement or servitude must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*y*).

Privileges and servitudes which pass as accessorial to the use and enjoyment of the principal thing granted—Omne accessorium sequitur suum principale.—In accordance with the maxim, "Quando aliquis aliquid concedit, concedere videtur et id, sine quo res concessa uti non potest," it has been held that by the grant of the use of a pump the grantee has a right to enter upon the grantor's land to repair the pump, although neither the soil itself nor the pump on which it stands be granted to him; and that if a man gives me a license under seal to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me (*z*). If one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away. And if a growing crop of grass is sold to be cut down and made into hay when it arrives at maturity, the purchaser has a right by implication of law to make the grass into hay on the land (*a*). If a landowner has granted to another a right to dig coal-pits in his land, and to take and carry away coal, all things necessary for the exercise and enjoyment of the right pass therewith to the grantee. He has a right, therefore, to erect sheds and steam-engines, and fix such machinery as may be necessary to drain the coal-pits, draw up the coals and iron, and work the coal-field, although the grant of the incorporeal right may be silent as to any such erections (*b*).

By the French law, "he to whom a servitude is due has a right to form all the works necessary to make use of and preserve the servitude. These works are at his own expense, and not at that of the proprietor of the estate subjected to the servitude, unless the deed establishing the servitude declare the contrary" (*c*).

Ways of necessity.—Whenever one man grants land to another to which there is no access but over the land of the grantor, or the land of a

(*u*) *Daniel* v. *Anderson*, 31 Law J., Ch. 610.
(*x*) Cod. Civ. art. 694.
(*y*) *Pyer* v. *Carter*, 1 H. & N. 922.
(*z*) *Pomfret* v. *Ricroft*, 1 Saund. 322e, 323. *Liford's* case, 11 Co. 52a.
(*a*) 1 Roll. Abr.; DISMES X., pl. 23.
(*b*) *Dand* v. *Kingscote*, 6 M. & W. 196.
(*c*) Cod. Civ. liv. 2, tit. 4, art. 697, 698.

stranger, which cannot lawfully be traversed, the grantee has a right of way over the grantor's land, as a way by necessity, and the grantor shall assign the way where he can best spare it. And if the owner of two closes, having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity (*d*). Where one sold land, and afterwards the vendee, by reason thereof, claimed a way to it over part of the plaintiff's land, there being no convenient way adjoining, it was held that he might well justify the using thereof, for otherwise he could not have any profit of his land: and if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law (*e*). A way by necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant; for there seems to be no difference when a thing is granted by express words, and where by operation of law it passes as incident to the grant. In both cases the grant is the foundation of the title, and it is as necessary to set forth the title to a way of necessity as it is to a way by grant (*f*).

Necessary incidents to a grant of a right of way or watercourse.—Every grantee of a right of way, or of the right of passage for waste water through an artificial drain or watercourse, extending from the land of the grantee through the land of the grantor, is bound to maintain and repair the way and the watercourse, if he wishes to use them, unless the grantor himself has expressly undertaken the performance of that duty. The grantee, therefore, has a right to go upon the land over which the easement is enjoyed to do the necessary repairs (*g*).

Under a general grant of a right of way, with liberty to make and lay causeways, and use the same with waggons and carriages, and carry coals, it was held that the grantee had a right to construct and use framed waggon-ways, if they were reasonably necessary for the profitable conveyance of coals, but that he was not entitled to make a transverse road across the land, for purposes foreign to the conveyance of coals (*h*). And where there was a grant of a right of way as a foot or carriage way, with all liberties, powers, and authorities necessary to the enjoyment thereof, it was held that the grantee of the way might lay down a flagstone upon the land in front of his house, over which the way passed, if the flagstone

(*d*) 2 Roll. Abr.; GRAUNT, Z., pl. 17, 18. *Staple* v. *Heydon*, 6 Mod. 4. *Howton* v. *Frearson*, 8 T. R. 50. *Morris* v. *Edgington*, 3 Taunt. 30. *Pinnington* v. *Galland*, 9 Exch. 12; 22 Law J., Exch. 349. *East. Co. Rail. Co.* v. *Dorling*, 5 C. B., N. S. 821; 22 Law J., C. P. 202.

(*e*) *Clarke* v. *Cogge*, Cro. Jac. 170.

(*f*) 1 Wms. Saund. 323a, 323b. *Proctor* v. *Hodgson*, 10 Exch. 824; 24 Law J., Exch. 195.

(*g*) *Taylor* v. *Whitehead*, 2 Doug. 745; *M'Swiney* v. *Haynes*, 1 Ir. Eq. R. 322; post, ch. 4.

(*h*) *Senhouse* v. *Christian*, 1 T. R. 569.

was reasonably necessary for his enjoyment of the way, and the laying of it down did not in any wise obstruct the carriage-road, or cause any injury or inconvenience to the grantor (*i*).

By the civil law, every owner who was entitled to a way, or the free passage of running water from his dominant tenement through an adjoining servient tenement, was entitled to enter upon the servient lands to repair the way or watercourse when necessary, and bring thereon the materials necessary for the purpose, making compensation to the owner of the servient tenement for all damage done in the progress of the repairs (*k*).

Right of towing on the banks of a navigable river.— There is no general common law right of towing along the banks of a navigable river (*l*); but such a right may be acquired by grant, custom, or prescription (*m*).

When an easement of support from the adjoining land of the grantor passes as accessorial to a grant of land or of a tenement.— If a landowner sells a portion of his land avowedly and expressly for building, or for the construction of a road or railway, he impliedly grants to the purchaser, in the absence of statutory provisions to the contrary, an easement of lateral support from his adjacent land; and if the vendor reserves to himself the right to the minerals underneath the surface, he nevertheless impliedly grants all such adjacent and subjacent support as is reasonably necessary to enable the purchaser to erect and maintain his buildings, road, or railway; and neither the vendor, nor those who claim under him, can afterwards excavate so as to endanger this support and derogate from the grant (*n*).

How far this adjacent and subjacent support must extend is a question which in each particular case will depend on its own special circumstances. If the surface of the land granted is merely a common meadow, or a ploughed field, the necessity for support will be much less than if it were covered with buildings. All which a grantor of the surface can be reasonably considered to grant or warrant, by implication of law, is such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or to enable the grantee to use it for purposes for which it was known to be required.

"Thus, if I grant a meadow to another retaining the minerals under it, and also the adjoining land, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or fall over. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings and diggings if by reason of the additional weight he has put on the land they

(*i*) *Gerrard* v. *Cooke*, 2 B. & P., N. S. 115.
(*k*) Gale's Easements, 325a.
(*l*) *Ball* v. *Herbert*, 3 T. R. 253.
(*m*) As to the right to the soil of towing paths, see post, ch. 6, s. 2.
(*n*) *North-East. Rail. Co.* v. *Crosland*, 32 Law J., Ch. 358.

cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied grant and warranty of support, subjacent and adjacent, as if the house had already existed (*o*). And if the additional weight of the building has in nowise caused the surface to sink, and the land would have sunk if no building had been put upon it, the excavator or miner is responsible for the damage done both to the land and buildings" (ante, p. 47). In reserving mines and minerals, therefore, the grantor must be understood to have reserved them so far only as he can work them consistently with the preservation of the grant of the surface.

Of the right to search for minerals under lands weighted by railways and canals.—By the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), it is enacted (s. 77) in the case of the purchase of lands by any company constituted under that act, that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except such part thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and that all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. And by s. 78 it is enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, &c., shall give notice in writing to the company of his intention; and if it appear to the company that the working of the mines is likely to damage the works of the railway, the company may, by giving compensation in the mode provided by the statute (*p*), prevent the working of the mines. But if, within thirty days after the receipt of the notice, the company do not state their willingness to treat for the payment of compensation, the owner of the mines may work them in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working mines in the district, making good damage done to the railway or works by improper working.

Similar provisions have been inserted in various acts of parliament incorporating canal companies, and enabling them to purchase lands for the formation of a canal, and the effect of them is to deprive the company of the right to support for the railway or canal from coal, ironstone, slate, or minerals lying beneath the surface of the adjoining land, within the

(*o*) *Caled. Rail. Co.* v. *Sprot*, 2 Macq. 452. *North-East. Rail. Co.* v. *Elliott*, 1 Johns. & Hem. 145; 29 Law J., Ch. 812; 30 Law J., Ch. 164. *Elliot* v. *N. E. R. Co.*, 2 Johns. & Hem. 565; 32 Law J., Ch. 402; 11 W. R. 604; 8 L. T. R., N. S. 337. *Harris* v. *Ryding*, 5 M. & W. 60. *Haines* v. *Roberts*, 7 Ell. & Bl. 625; 6 ib. 643.

(*p*) Post, ch. 16.

purchasing distance, or beneath the land over which the railway or canal is carried, unless they have purchased the slate or minerals, or compensation has been given in the manner prescribed by the statute (*q*).

Under statutory provisions of this sort, the company do not in the first instance pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage; the minerals remain the property of the owner of the soil; but where he is desirous of getting them, the company have the option of purchasing at a fair price, to be settled, in case of dispute, in the usual way. These provisions, it has been observed, are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of an intended railway or canal in the first instance, before it is constructed; and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really want to get them. When this happens, the company have an option either to buy, in which case the landowner cannot get the minerals, but is fully compensated for the loss of that right, or not to buy, in which case he receives no compensation at all, and his right to get them remains as complete as if no railway had been made (*r*).

These statutory provisions do not exclude the ordinary right of a purchaser to support from adjacent land situate beyond the purchasing limits; and, therefore, where a vendor has sold land to a railway company for the erection of a bridge or a viaduct, he cannot excavate his own adjoining land, situate beyond the purchasing limits, so as to deprive the bridge or viaduct of the necessary adjacent support (*s*).

It has been held that clauses in canal acts, requiring coal-owners to give notice to canal companies of their intention to work their mines within a certain distance of the canal, and giving liberty to the company to inspect the works, and to prohibit the owners, upon compensation being made, from working within that distance, were framed for the purpose of enabling the company to purchase out the rights of the coal-owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; that if the company declined the purchase, the coal-owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the act passed, their former rights in that respect not having been taken away by the act, which has only appro-

(*q*) *Fletcher* v. *Gt. West. Rail. Co.*, 4 H. & N. 252; 28 Law J., Exch. 150.

(*r*) *Dudley Canal Nav. Co.* v. *Grazebrook*, 1 B. & Ad. 72. *Stourbridge Canal Co.* v. *Dudley (Earl of)*, 30 Law J., Q. B. 108. *London & North-West. Rail. Co.* v. *Ackroyd*, 31 Law J., Ch. 588; 6 L. T., N. S. 124.

(*s*) *Elliot* v. *North-East. Rail. Co.*, 32 Law J., Ch. 402. *N. E. R. Co.* v. *Crosland*, 32 Law J., Ch. 353.

priated the surface of the land, and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c. to the owners, to be enjoyed in the same manner as before (*t*).

"The difficulty which arose upon the Dudley canal act was this, that the wording of the clause there, 'doing no damage,' was coupled with the power to the company to purchase, and it seemed, in the judgment of the court, to be a useless and frivolous clause, unless they gave a wider interpretation to the words 'working without doing damage,' because, they said, if it is to be a simple and absolute clause that no damage shall be done, it is a very idle thing to put the company upon the terms of purchasing" (*u*). But where there is no clause in the act requiring the railroad or canal proprietors to procure immunity from damage by purchasing the minerals, and authorizing them to make the purchase, the mine-owner cannot work his mine so as to destroy or injure the railroad or canal (*x*). And the same principle applies if the works and excavations of the mine-owner, endangering a railway structure, are situate beyond the purchasing limits, so that the clause does not apply (*y*). If a mine owner, having worked up to the purchasing limits, gives notice to the company, and the company decline to purchase the minerals, and the mine-owner proceeds with the working of the mine under the railway, and the soil sinks, and the railway drains and drainage works become choked up or destroyed, and the surface-water from the railway percolates through the earth, and floods the mine, the railway company is in general bound by statute to make good the damage and rebuild the drains, and this from time to time, as the earth subsides through the working of the mine (*z*).

Servitude of support from one house to another, where several houses have been built together, so as to require mutual support.— Where a number of houses have been built together by one owner, so as to require and receive mutual support, there is either, by a presumed grant, or a presumed reservation, a right to such mutual support for their common protection or security, so that if the houses are afterwards sold and conveyed to different individuals, this mutual dependence of one house upon another, and right to mutual support, continues; and if several adjoining landowners, by common consent and agreement, build their houses together, so that the house of one of them rests upon and requires the support of the adjoining house, there would be an implied grant of a right to mutual support; and this right would continue, notwithstanding alterations in

(*t*) *Wyrley Canal Co.* v. *Bradley*, 7 East, 371.

(*u*) Wood, V. C., *North-East. Rail. Co.* v. *Elliott*, 29 Law J., Ch. 811.

(*x*) *Reg.* v. *Aire & Calder Nav. Co.*, 30 Law J., Q. B. 337.

(*y*) *North-East. Rail. Co.* v. *Elliott*, 2 De G. F. & J. 423; 30 Law J., Ch. 160; 32 Law J., Ch. 402.

(*z*) *Bagnall* v. *Lond. & North-West. Rail. Co.*, 7 H. & N. 423; 31 Law J., Exch. 121.

the ownership of the houses by sale, mortgage, devise, &c. (*a*). But if two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to an easement of support from the other (*b*).

Accessorial servitude of support where the separate floors of a building are granted to several different proprietors.—If the owner of a house conveys the upper story to a purchaser, there is an implied grant of support from the lower stories, so that the owner thereof cannot interfere with the walls and beams upon which the upper story rests, and prevent them from affording proper support (*c*). And if a man builds a house, and forms each story or flat into a separate dwelling, and sells or lets the different stories of the house to different individuals, there is an implied grant to every purchaser or hirer of the rooms of all such adjacent and subjacent support as may be necessary for the maintenance and enjoyment of each respective dwelling. And when the different floors and flats of the same house are held as separate freeholds by different individuals, the owner of the lower rooms and foundations is in general bound to uphold and maintain the main walls and necessary supports of the rooms above (*d*).

"Where I have a chamber below, and another has a chamber above mine, as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber, for the salvation of his chamber above" (*e*). There is a writ in NATURA BREVIUM to a mayor, to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; and that is grounded upon a custom (*f*).

If the owner of a house grants the upper rooms to be holden and enjoyed for life or in fee, reserving to himself the lower rooms, he impliedly undertakes not to do anything which will derogate from his own grant. If, therefore, he were to remove the supports of the upper room he would be liable to an action (*g*). And if he conveys the house to another by deed, reserving a lower story to himself, with powers of enlarging and altering such lower story, these powers must be exercised so as not to interfere with or endanger the necessary support to the rooms above,

(*a*) *Richards* v. *Rose*, 9 Exch. 221.

(*b*) *Solomon* v. *Vintners' Co.*, 4 H. & N. 598. *Peyton* v. *Mayor of London*, 9 B. & C. 736. *Kempston* v. *Butler*, 12 Ir. C. L. R. 516.

(*c*) *Caledon. Rail. Co.* v. *Sprot*, 2 Macq. 450.

(*d*) *Richards* v. *Rose*, 9 Exch. 221; 23 Law J., Exch. 3. *Humphries* v. *Brogden*, 12 Q. B. 747.

(*e*) Anon. Keilw. 98, pl. 4. Anon. 11 Mod. 8.

(*f*) *Tenant* v. *Goldwin*, 6 Mod. 314; 2 Ld. Raym. 1093: Fitz. Nat. Brev. 127.

(*g*) Parke, B., 5 M. & W. 71.

unless the right of support is expressly renounced by the grantee of the upper stories (*h*).

By the French law, "when the different stories of a house belong to different proprietors, and the titles to the property do not regulate the mode of reparations and reconstructions, they must be made in the following manner:—The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto; the proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest" (*i*).

Grants of the privilege of a free passage of light and air to newly-opened windows across the adjoining land of the grantor must be authenticated by deed, or established by implied grant, or by prescription. If a parol license or permission is granted to a neighbour to open a window overlooking the adjoining ground of the defendant, the parol license will not prevent the defendant from building a wall on his own land, and thereby shutting out the light and air from the newly-opened window. If, therefore, permission not under seal is given to a defendant, to open a window in his house overlooking the plaintiff's garden, and the plaintiff, after the window has been opened, finding that his privacy has been invaded, builds a wall on his own ground which blocks up the offending window, and the defendant then enters upon the plaintiff's land, and knocks the wall down, he will be responsible in damages for a trespass, and cannot justify his entry upon the plaintiff's land under colour of the parol license to open the window (*k*).

When the privilege of free passage for light and air across adjoining land passes as accessorial to a grant or conveyance.—If the owner of a house and the surrounding land sells the house without the land, a free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land, unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house. Having granted the house, he can do no act in derogation of his own grant. And if he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building-land, and the intention to build thereon may have been known

(*h*) *Smart* v. *Morton*, 5 Ell. & Bl. 47.
(*i*) Cod. Civ. liv. 2, tit. 4, art. 664.
(*k*) *Bridges* v. *Blanchard*, 1 Ad. & E. 549. *Wood* v. *Leadbitter*, *Lee* v. *Stevenson*, ante, p. 65.

to the purchaser at the time he purchased it (*l*). But where the owner in fee of an ancient house, and of the land surrounding the house, sold such surrounding land without the house, and the purchaser built thereon, so as to obstruct the access of light and air to the windows of the ancient house, it was held that the owner had no remedy for the injury, and that there was no implied restriction on the right of the purchaser to build as he pleased on his own land (*m*).

Where the shell of an unfinished house was sold, with openings in the walls for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land, so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right of way to the apertures intended for doors. And when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy; so that they cannot subsequently interfere with each other's enjoyment of the windows and doors as marked out and impliedly agreed upon at the time of the sale (*n*). So if two lessees of houses and windows derive title from the same lessor, the one cannot, by buildings or erections, encroach upon the light and air of the other (*o*).

In these cases the right to the free passage of a reasonable quantity of light and air across the adjoining land becomes appurtenant to the house, and passes therewith to all successive owners of the property.

Upon the same principle, it has been held that a landlord, after he has demised his house, cannot obstruct the lights existing at the time of the demise (*p*); nor can a lessee darken or obstruct windows of his own landlord which existed at the time of the demise, whether such windows were ancient or of recent construction (*q*). But the right of uninterrupted enjoyment is confined to the windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened, or to new windows varying in size, elevation, or position (*r*).

Of the rule or maxim of law that no man shall derogate from his own grant.— It is, as we have seen, a principle of law that no man shall derogate from his own grant (*s*); if, therefore, a man has granted to another estovers, or a right to cut and carry away wood for burning, or a right to

(*l*) *Palmer* v. *Fletcher*, 1 Lev. 122. Bayley, B., *Canham* v. *Fisk*, 2 Cr. & Jerv. 128. *Swansborough* v. *Coventry*, 9 Bing. 305.

(*m*) *White* v. *Bass*, 7 H. & N. 722; 31 Law J., Exch. 283.

(*n*) *Compton* v. *Richards*, 1 Pr. 27. *Glave* v. *Harding*, 27 Law J., Exch. 286.

(*o*) *Coutts* v. *Gorham*, 1 M. & M. 396. *Jacomb* v. *Knight*, 11 W. R. 585.

(*p*) *Cox* v. *Matthews*, 1 Ventr. 237, 239. *Rosewell* v. *Pryor*, 6 Mod. 116.

(*q*) *Riviere* v. *Bower*, R. & M. 24.

(*r*) *Blanchard* v. *Bridges*, 4 Ad. & E. 190. *Hutchinson* v. *Copestake*, 9 C. B., N. S. 863; 31 Law J., C. P. 19.

(*s*) Ante, pp. 74, 75. *Ellis* v. *Mayor, &c. of Bridgnorth*, 2 N. R., C. P. 488.

fish for his own use and consumption, and he destroys all the wood out of which the estovers were to be taken, or draws all the water away from the pond or stream, and destroys the fish, the party grieved shall have his remedy by action; for these are wilful acts of the grantor, and it is a misfeazance in him to annul or avoid his own grant (*t*). If a man grants lands, reserving to himself the right to the coals and minerals beneath the surface, he cannot excavate them to the injury of the surface, and thereby derogate from his own grant. And if one man grants to another the privilege or easement of making and maintaining a covered sewer or watercourse, of certain specified dimensions, through the land of the grantor, for the purpose of carrying off waste and refuse water from the land of the grantee, the grantor has no right to use the sewer, and pour water into it, without the license and permission of the grantee (*u*). If a millowner sells a watermill which is supplied by water from an open sluice on the land of the vendor, the vendor cannot, after he has sold the mill, lawfully close the sluice, as he would, by so doing, derogate from his own grant. Both the vendor, and all persons claiming under him, are bound to keep the sluice open for the benefit of the grantee of the mill (*x*).

Of the transfer from one person to another of easements and profits à prendre.—*Easements and profits à prendre in gross*, not appendant or appurtenant to land, cannot be transferred from hand to hand, and kept alive, so as to burthen the land for all time in the hands of subsequent purchasers and proprietors; and no easement, privilege, or profit to be enjoyed over, or taken from, land can be made appendant or appurtenant to land, unless it is accessorial to the use and enjoyment of landed property (*y*). There must be a dominant tenement, for whose benefit the right exists, as well as a servient tenement (*z*). Thus, a right of way unconnected with the enjoyment or occupation of land cannot be annexed as an incident to an estate, nor can a way appendant to a house or land be granted away or made a way in gross, for no one can have such a way but he who has the land to which it is appendant. It is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and annex them to it, nor can he subject the land to a new species of burthen, so as to bind it in the hands of an assignee. "It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is

(*t*) Twysden, J., *Pomfret* v. *Ricroft*, 1 Saund. 322.

(*u*) *Lee* v. *Stevenson*, El. Bl. & El. 512; 27 Law J., Q. B. 266.

(*x*) *Miner* v. *Gilmour*, 33 Law T. R., H. L. 98.

(*y*) *Ellis* v. *Mayor, &c. of Bridgnorth*, 32 Law J., C. P., 2 N. R. 489.

(*z*) Nemo potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium; nec quisquam debere nisi qui prædium habet.—Instit. lib. 2, tit. 4, § 3. De Servitutibus.

owner and occupier, have a right of way over other land; and a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter" (*a*).

"Private ways over another man's grounds," observes Blackstone, "may be grounded on a special permission, as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person, and the grantee cannot assign over his right to any other" (*b*). Thus a license to a man to hunt in my park, or to walk in my orchard, extends but to himself. And a way granted to church over any land extends not to any other but the grantee himself (*c*), and therefore he may not give or grant this to another (*d*). But if the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment thereof, it passes with the tenement to which it is annexed to the successive assignees and owners thereof by a grant of the tenement, so that the benefit and the burthen of the exercise and enjoyment of the incorporeal right will accompany the dominant and servient tenements into the hands of the several successive assignees and owners thereof, so long as such dominant and servient tenements remain vested in the hands of separate proprietors (*e*).

A claim by one landowner to enter upon his neighbour's land and cut down trees and sell them, is a claim of a profit à prendre in gross, and cannot be made appurtenant to land, as it is in nowise accessorial to the use and enjoyment of an estate, but a claim to cut down thorns and firewood to burn in the dwelling-house of the claimant, is a profit à prendre, accessorial to the use and enjoyment of the dwelling-house, and may be made appendant or appurtenant thereto, so as to give the owners and occupiers thereof for the time being a right to the privilege (*f*).

By the French civil code, it is declared to be lawful for proprietors to establish over their estates, or in favour of their estates, such servitudes as seem good to them, provided the services established be not imposed either on a person, or in favour of a person, but only on an estate, and for the benefit of an estate (*g*).

"By the grant of trees by tenant in fee simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators, being, in understanding of law, divided as chattels from the freehold, and the grantee hath power incident and implied from the grant to fell them when he will, without any other

(*a*) *Ackroyd* v. *Smith*, 10 C. B. 188. *Bailey* v. *Stevens*, 12 C. B., N. S. 91. *Hall* v. *Tupper*, 9 Jur. N. S. 725.
(*b*) 2 Bl. Comm. 35.
(*c*) Wingate's Maxims, 379.
(*d*) Shep. Touch. 239.
(*e*) See post, ch. 3, s. 1, as to the merger and extinguishment of easements and profits by unity of ownership of the dominant and servient tenements.
(*f*) *Dowglass* v. *Kendall*, Cro. Jac. 256.
(*g*) Cod. Civ. No. 686.

special license (*h*); and the law gives him power, as incident to the grant, to enter upon the land, and show the trees to those who would have them, for without sight none would buy, and without entry none could see them (*i*); and he may assign over the property in the trees, and his assigns may enter upon the land, so long as it remains the property of the grantor, and fell the trees and carry them away" (*k*).

A grant to a man and his heirs of woods, underwoods, corn, and produce which may hereafter grow on the land of the grantor, conveys to the grantee and his heirs (*l*) a profit à prendre, exerciseable against the grantor and his heirs, so long as the ownership of the soil remains in them (*m*); but no specific property in any thing vests in the grantee until it has been severed from the inheritance, and reduced into possession (*n*). A grant of this description amounts to a mere personal contract, operative only between the immediate parties to it, and their heirs, and does not bind the land in the hands of persons to whom the land may be subsequently conveyed, and who were no parties to the deed of grant (*o*).

"Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is their assets, real and personal, to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion, and it would hardly be possible to know what right the acquisition of any parcel of land conferred, or what obligations it imposed" (*p*).

There are cases, indeed, where the right to the future produce and profits of the soil exists as an assignable and inheritable interest, burthening the land in the hands of subsequent purchasers and proprietors; but these are cases where the relationship of landlord and tenant existed between grantor and grantee of the right, and the grant constitutes, or is accompanied by, a covenant which runs with the land, binding upon both the assignee of the reversion and the assignee of the term (*q*). Thus, where a lessor granted, and covenanted in a lease, that the lessee, his executors and assigns, should take and carry away such corn as should

(*h*) *Stukely* v. *Butler*, Hob. 168. *Cardigan (Earl of)* v. *Armitage*, 2 B. & C. 210.

(*i*) *Liford's* case, 11 Co. 51b. 52a.

(*k*) *Palmer's* case, 5 Co. 24b. *Bassel* v. *Maynard*, Cro. Eliz. 819.

(*l*) Described as "a fee simple in a profit à prendre,"—"an odd sort of estate." Erle, C. J., 12 C. B., N. S. 103.

(*m*) *Barrington's* case, 8 Co. 136b.

(*n*) *Holroyd* v. *Marshall*, 30 Law J., Ch. 387. *Lunn* v. *Thornton*, 1 C. B. 379.

(*o*) *Keppel* v. *Bailey*, 2 Myl. & K. 535. Ld. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359. *Malone* v. *Harris*, 11 Ir. Ch. R. 39.

(*p*) Ld. Brougham, *Keppel* v. *Bailey*, ut sup.

(*q*) Addison on Contracts, Ch. 22, s. 1, 5th edn.

be growing upon the ground at the end of the term, and the lessor sold and conveyed away his reversion, and the executor of the lessee, having sown the corn, sold it, it was held that the property in the growing crop vested in the purchaser, who might enter upon the land and take it, for there was both a covenant and a grant, and the covenant ran with the land, and bound both the assignee of the reversion and the assignee of the term (*r*). And such an interest running with the land, and binding the assignee of the reversion and the assignee of the term, will pass under a general assignment of a lessee's "tenant right" (*s*).

There are also, as we shall presently see, certain rights of common in gross, and certain customary rights of sole and several pasturage, which exist in various manors as inheritable and transferable estates; but these are rights vested in the customary tenants of the manor, of depasturing cattle upon open, uninclosed downs and moors and waste places belonging to the lord of the manor, and depend upon the custom of the manor, and cannot be relied upon as authorities for ascertaining the rights of parties in ordinary cases.

Where the grant is of a liberty, license, power, or authority to dig, work, mine, and search for, raise and carry away, metals and minerals in certain land, and dispose of the ore that should be there found to the use of the grantee and his heirs, and is not a grant or demise of *all* the ores, metals, or minerals then existing on the land, or existing within certain limits, so as to exclude the grantor himself from searching for minerals in his own land, or within the limits specified, it is nothing more than a grant of a license (irrevocable on account of its carrying an interest), to search and get ore, with a grant of such of the ore only as can be found and got, the grantor parting with no estate or interest in the rest. In this case the grantee has no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; but he has a right of property only in such part thereof as, upon the liberty granted to him, should be dug and got; that is no more than a mere right to a personal chattel when obtained in pursuance of incorporeal privileges, granted for the purpose of obtaining it (*t*). A license of this description, however, granted to a man and his heirs, conveys an inheritable and assignable interest (*u*), so that the grantee may sell and assign the right, and his assignee would have a right to enter and search for, raise and carry away, minerals as against the grantor and his heirs. But whenever a profit à prendre merely is granted, there is only a license or covenant so long as no specific chattel has been

(*r*) *Grantham* v. *Hawley*, Hob. 132. *Martyn* v. *Williams*, 1 H. & N. 827; 26 Law J., Exch. 121.

(*s*) *Petch* v. *Tutin*, 15 M. &. W 116.

(*t*) *Doe* v. *Wood*, 2 B. & Ald. 738. *Chetham* v. *Williamson*, 4 East, 475. *Mountjoy's* case, 4 Leon. 147; Godb. 18. *Newby* v. *Harrison*, 1 Johns. & Hem. 398.

(*u*) *Mushett* v. *Hill*, 5 Bing. N. C. 694.

severed from the inheritance, and taken possession of under it (ante, p. 79); and such license or covenant will not bind the land in the hands of subsequent purchasers, without notice (*v*); for "if a man grants a license, and then parts with the property over which the privilege is to be exercised, the license is gone (*x*); for it is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil, the authority is instantly at an end" (*y*).

If, however, the grant is not merely a grant of a profit à prendre *in alieno solo*, but a conveyance of the land itself, such as a grant to a man, his heirs and assigns, of *all* the existing minerals (*z*), or a right to search for, raise, and carry away all the minerals to be found within certain prescribed limits, the property in the minerals would then pass to the grantee, and the latter would be the sole owner of them, the grantor continuing the owner of the surface.

Exclusive licenses must be framed with words of an exclusive character, otherwise the grantor is not precluded from granting the same privilege to other persons (*a*). A mere licensee of a right of way, or of a right of passage with boats on a canal, who has no interest in the soil over which the privilege is exercised, has no right of action against a wrong-doer who exercises the same privilege, but does not obstruct the licensee in the enjoyment of his right (*b*).

The Roman law discourages the division or dilution, amongst a number of separate proprietors, of the rights of ownership of an estate. The Romans framed their laws with the view of preserving the freedom of the right of property for all times and all future persons. They provided that an estate shall have, at one and the same time, only one dominus over it, and that his dominion should constantly remain as little circumscribed as possible, and not be diminished by dividing his powers and prerogatives amongst several persons. "The only true restrictions on property recognized by the Roman lawyers were the servitudes" (*c*).

Rights over another's land claimable by custom.—To give validity to a custom which has been well described to be an usage obtaining the force of law, within a particular district, or at a particular place, over the persons or thing to which it relates, it must be certain and reasonable in itself. It is presumed to have commenced from time immemorial, and must be proved to have continued without interruption for the time mentioned in the Prescription Act. The question whether it is reasonable or

(*v*) Ld. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 Law J., Q. B. 965.

(*x*) Pollock, C. B., *Coleman* v. *Foster*, 1 H. & N. 40. *Brown* v. *Metrop. Co., &c.*, 1 Ell. & Ell. 832.

(*y*) Parke, B., *Wallis* v. *Harrison*, 4 M. & W. 544. *Malone* v. *Harris*, ante, p. 79.

(*z*) *Cardigan* (*Earl of*) v. *Armitage*, 2 B. & C. 197.

(*a*) *Newby* v. *Harrison*, 1 Johns. & Hem. 396.

(*b*) *Hill* v. *Tupper*, 9 Jur. N. S. 725.

(*c*) Mackeldy's Civil Law, by Kaufman, book 1, ch. 4, § 293.

not belongs to the judges of the land to determine; and a custom is not unreasonable merely because it is contrary to a rule or maxim of the common law, nor because it is prejudicial to the interests of a particular individual; but if it is highly inconvenient in its enjoyment, and the inconvenience is real, general, and extensive, it will be bad, though it has prevailed from time immemorial (*d*).

A custom claimed by the inhabitants of a particular district to go upon the soil of another, to take or to use water from a spring or well, or to wash and water cattle in a pond, is a good custom (*e*); and so is a custom claimed by victuallers, coming to a fair holden at stated periods, to enter upon that part of the common or waste of a manor where the fair is held, and there erect booths and stalls, and put down posts, and place tables on the land, making a certain customary payment to the lord of the manor, when demanded (*f*). A custom for the inhabitants of a village to resort to village-greens, or uninclosed waste land or commons, the property of the lord of the manor, for village sports, and for the purpose of recreation and amusement, is a good custom (*g*); but a claim by an inhabitant of a town of a right to go at all times over every portion of inclosed cultivated ground, cannot be supported, as it is inconsistent with any beneficial use and enjoyment of the inclosure by the owner or occupier (*h*).

The inhabitants of a vill or parish cannot as such claim by custom to have a profit à prendre from the soil of another. Therefore, a custom for all the inhabitants occupying lands in a particular district to take drift sand or stones from a close contiguous to the sea-shore, for the mending of their roads, cannot be supported, as the sand, when it drifts on the close from the beach, becomes part of the soil of the close (*i*). Neither can the inhabitants of a parish claim a right by custom to angle and catch fish in another's pond, although the claim be confined to a right to catch them, setting up no right to take them away, for such a right, vested in a multitude of persons, would be destructive of all the fish (*k*).

The general doctrine, that a right to take a profit in the soil of another cannot by law rest on custom, is founded on the notion that such an interest must, for its existence, have some person in whom it is vested, and that a fluctuating body of persons, which has no entirety or permanence, cannot take that interest which by supposition is immemorial and permanent, because such a body, from its nature, cannot prescribe

(*d*) *Tanistry's* case, Davy 31, 32. Co. Litt. 113a. *Tyson* v. *Smith*, 9 Ad. & E. 406; 6 ib. 745. *Rogers* v. *Brenton*, 10 Q. B. 26.

(*e*) *Race* v. *Ward*, 4 Ell. & Bl. 702.

(*f*) *Tyson* v. *Smith*, 6 Ad. & E. 745; 9 ib. 406.

(*g*) *Abbot* v. *Weekly*, 1 Lev. 176. *Fitch* v. *Rawling*, 2 H. Bl. 393. *Mounsey* v. *Ismay*, 32 Law J., Exch. 94.

(*h*) *Dyce* v. *Lady James Hay*, ante, p. 64. *Bell* v. *Wardell*, Willes, 202.

(*i*) *Blewett* v. *Tregonning*, 3 Ad. & E. 554. *Att.-Gen.* v. *Mathias*, 4 K. & J. 579. *Constable* v. *Nicholson*, 11 W. R. 698.

(*k*) *Bland* v. *Lipscombe*, 4 Ell. & Bl. 713, note (c).

for any thing. Necessity, however, controls this and creates certain exceptions in the case of rights of common, and the stannary customs of Cornwall, in respect of the right of digging and searching for tin.

When a profit à prendre is claimable by custom — Manorial customs. — *Rights of common*, claimable by the copyhold or customary tenants of a manor, in the demesne lands of the lord of the manor (*l*), illustrate both the rule, that a profit à prendre is not claimable by custom, and the exception to that rule. Thus, the right of common of pasture in itself is an interest in land — the taking of a profit of the soil, and properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another manor, they must, because they can, do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but if they claim it in the lord's wastes, they cannot prescribe in their own names and rights, by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land; they are therefore, from necessity, allowed to claim it by custom (*m*). The necessity grows out of the original compact between the lord and the customary tenants, when they received permission to cultivate for their own benefit, on condition of the render of certain services, certain portions of the lord's land. That compact included the right of common on the lord's waste, and the law will not suffer that right to want a legal character, and so be without the means of legal enforcement, though at the expense of strict legal reasoning (*n*).

A custom in a manor, that the copyholders of inheritance may, without license from the lord of the manor, break the surface of their own copyhold tenements, and dig and get clay therefrom without stint, for the purpose of making and selling bricks, is a good manorial custom. In a recent case, it was contended that such a custom was bad, as being inconsistent with the right of the lord, who had an interest in the soil, and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do. "We are," however, observes the court, "unable to draw any sound distinction between a custom for copyholders to take all the timber, or trees (*o*), or all the minerals in their own copyholds, and a custom to take clay. It appears to us, that the cases of profits à prendre, or easements on the waste of the lord, or *in alieno solo*, have no application to the present question. A copyholder may, by custom, not only have a possessory, but a proprietary, right in the trees and minerals in his own copyhold tenement. In the case of minerals, the taking them is, in effect, a taking of a portion of the corpus of the

(*l*) *Gateward's* case, 6 Co. 60a. *Grimstead* v. *Marlow*, 4 T. R. 719.
(*m*) *Foiston* v. *Crachroode*, 4 Co. 369. *Heydon & Smith's* case, 13 Co. 67.
(*n*) *Rogers* v. *Brenton*, 10 Q. B. 26.
(*o*) *Blewett* v. *Jenkins*, 12 C. B., N. S. 16.

copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only, by custom, work old mines already opened, but that he may also, by custom, dig within his tenement for new ones, and, if successful, work them (*p*).

But a custom claimed by the lord of a manor, or his tenants, to dig coal-pits in the inclosed freehold lands of the manor, when and as often as they pleased; to lay their coals, when got, on any part of the lands of the customary tenants, near to the coal-pits, at any time of the year they please, and to let them lie on such lands as long as they please, is uncertain and unreasonable, and therefore void, for it might deprive the tenant of the whole benefit of his land (*q*).

A claim on the part of the lord of a manor, founded on the custom of the manor, of an unlimited and unrestricted right to inclose and confer in severalty upon any person, from time to time, such portions of the waste as he in his discretion may think fit, cannot be supported, as it is utterly inconsistent with the existence of any right of common, for the lord might inclose the whole of the waste, and so annihilate the rights of the commoners. But the lord has concurrent rights with the commoners. He has himself a right, unless excluded by the custom, to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of the commoners. And when it is ascertained that there is more common than is necessary for the cattle which the commoners are entitled to turn on, the lord may take it for his own purposes, and he may then inclose, leaving sufficiency of common for the commoners. And where fences are wrongfully erected upon land, subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the common, but he may remove the whole of the fences, so as to restore to himself the full and unrestricted exercise of his right (*r*).

A right of common is either appendant, appurtenant, or in gross. When it is appendant or appurtenant to a messuage or lands, it passes, as we have seen, by a grant of the messuage or land, to the successive owners and occupiers thereof (*s*).

Common appendant is a right annexed to arable land of depasturing on the lord's waste beasts that serve the plough, such as horses and oxen, or which manure the land, such as kine and sheep. "The reason for common appendant," observes Willes, C. J., "appears to be this, that as the tenant would necessarily have occasion for cattle not only to plough,

(*p*) *Salisbury (Marquis of)* v. *Gladstone*, 6 H. & N. 129; 30 Law J., Exch. 3.

(*q*) *Broadbent* v. *Wilks*, Willes, 363. *Hilton* v. *Earl Granville*, 5 Q. B. 726. *Blackett* v. *Bradley*, 1 B. & S. 140; 31 Law J., Q. B. 65.

(*r*) *Arlett* v. *Ellis*, 7 B. & C. 346.

(*s*) *Sacheverell* v. *Porter*, 2 Roll. Abr. 60, pl. 4.

but likewise to manure his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land, and therefore of common right, if the lord had any waste, he might put his cattle there when they could not go on his own arable land. This right is so necessarily incident to the land, that it cannot be severed therefrom; and therefore if the land be divided never so often, every little parcel is entitled to common appendant. But the tenant can only have the right of common for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof. And it is plain that he cannot have the right for cattle which he borrows, unless he make use of them all the year to plough or manure his land" (*t*). Although this kind of common is regularly appendant only to arable land, yet it may be claimed as appendant to a manor or farm containing pasture, meadow, and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow pasture, &c. (*u*).

Common appurtenant is a right derived from the possession or occupation of land of depasturing a limited number of beasts upon the lord's waste, or upon the uninclosed land of an adjoining proprietor, and is claimable by grant or by prescription (*x*). The right is limited to beasts levant and couchant upon the land to which the right is appurtenant, so that a claim to a right of common appurtenant "*sans* number" is bad. The number of cattle which can be "levant and couchant" upon the estate is the number which the produce of the land is capable of maintaining throughout the winter. "If my land to which I claim common belonging can yield me stover to find a hundred cattle in winter, then shall I have common in summer for a hundred cattle in the land out of which I claim common, and so for more or fewer proportionably" (*y*). If the commoner has turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining, he has exceeded his legal rights, and is liable to an action (*z*).

Common of shack, observes Bayley, J., "is a right of persons occupying arable land uninclosed to turn out their cattle at certain seasons to feed promiscuously over the whole open field. If there were no common right of this sort, every man would be bound to keep his cattle upon his own land, which would be productive of great inconvenience, and in many instances would be impossible. In order to obviate this, every man's cattle are allowed the full range of the whole field; but the number which

(*t*) *Bennett* v. *Reeve*, Willes, 231; Bac. Abr. COMMON A. 1.

(*u*) Bac. Abr. COMMON A. 1.

(*x*) *Cowlam* v. *Slack*, 15 East, 107.

(*y*) *Smith* v. *Bonsall*, Golds. 117. *Cole* v. *Foxman*, Noy's R. 30. *Cheesman* v. *Hardham*, 1 B. & Ald. 711.

(*z*) *Whitelock* v. *Hutchinson*, 2 Mood. & Rob. 205.

each man is at liberty to turn out is limited to that which the land of each individual is capable of supporting" (*a*).

Right of common pur cause de vicinage.—To establish a common *pur cause de vicinage*, it must be proved that the inhabitants have usually inter-commoned with one another; the beasts of the one straying into the other's fields without any molestation on either side. There must not only be absence of fence, but mutual acquiescence, and an immemorial allowance of the straying of the cattle (*b*).

Common of turbary, or the liberty or privilege of cutting and carrying away turf, is appendant to an ancient dwelling-house, and the right is limited to such a quantity as is sufficient to burn in the ancient chimneys and fire-places of the house (*c*); consequently a claim to cut and carry away turf for sale (*d*), or to make grass-plots or paths, cannot be supported (*e*).

Common of estovers, or the liberty or privilege of cutting down and carrying away trees, or loppings of trees, shrubs, and underwood, in another man's woods, coppices, or forests, for burning, building, or inclosing, is also appendant to an ancient dwelling-house, and is claimable by grant or by prescription, except in the case of copyholders, who may, it seems, claim by custom (*f*). Consequently a claim to cut down and carry away trees for sale cannot be claimed as common appendant (*g*).

The nature and extent of the right, and the periods of the year for the exercise and enjoyment of it, are to a great extent defined and controlled by manorial or local custom and usage. According to Bracton, the right must be exercised with reason and moderation, according to the size of the wood or waste in which the right is to be exercised, and the size of the tenement to which it is annexed (*h*). The estovers must be expended within or upon the house, and cannot lawfully be sold or exchanged; nor can the right be enlarged or extended. A tenant having a right to estovers for the repair of his dwelling-house and farm-buildings, cannot "enlarge his house with the timber, nor board the sides of a barn which had muddle walls, or the like before" (*i*). If a man has estovers belonging to his house, and he builds new chimneys where there were no chimneys before, he cannot use the estovers in the new chimneys (*k*). But if he sets up a new chimney where an old one was before, he shall have his estovers for the new chimney (*l*).

(*a*) *Cheesman* v. *Hardham*, 1 B. & Ald. 711. *Sir Miles Corbet's* case, 7 Rep. 57.
(*b*) *Clarke* v. *Tinker*, 10 Q. B. 618.
(*c*) 6 Co. 36b, 37a. *Dean, &c. of Ely*, v. *Warren*, 2 A tk. 189.
(*d*) *Valentine* v. *Penny*, Noy's R. 145.
(*e*) *Wilson* v. *Willes*, 7 East, 121.
(*f*) Bract. fol. 231. *Selby* v. *Robinson*, 2 T. R. 758.
(*g*) *Bailey* v. *Stevens*, 31 Law J., C. P. 226; 12 C. B., N. S. 113.
(*h*) Bract. fol. 231.
(*i*) *Earl of Pembroke's* case, Clayt. 47.
(*k*) *Luttrell's* case, 4 Co. 87a.
(*l*) *Costard* v. *Wingfield*, 2 Leon. 44.

"If a man be seised of a house in right of his wife, and another grants to the husband and his heirs to have sufficient estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So, if one have a house on the part of his mother, and one grants to him that he and his heirs shall have competent housebote to be burnt in the same house, this is appurtenant to the house; and although it be a new purchase, it shall go with the house to the heir on the part of the mother" (*m*).

When copyholders for life, according to the custom, have used to have common in the waste of the lord of the manor, or estovers in his woods, or any other profit à prendre in any part of the manor, and afterwards the lord aliens the wastes or woods to another in fee, and after that grants certain copyhold houses and lands for lives, such grantees shall have common of pasture, or common of estovers, &c., notwithstanding the severance, for the title of the copyholder is paramount the severance; and the custom unites the common or estovers, which are but accessaries or incidents, as long as the house or land, being principal, is maintained by the custom; which customary appurtenances are not appertaining to the estate of the lord, for he is the owner of the freehold and inheritance of all the manor, but they are appertaining to the customary estate of the copyholder, after the grant made unto him; which profit à prendre being due by custom to the copyhold tenement, notwithstanding the fine or feoffment of the waste or woods made by the lord remains, and is preserved by the custom, which is, as hath been said, the title of the copyholder, and is paramount to the severance; but if the copyholder had derived his interest from the estate of the lord, then clearly, by the feoffment, fine, &c., of the lord, all those who claim afterwards shall be barred of any profit à prendre in the same waste or woods" (*n*).

Common in gross is a right of common of pasture not appertaining to any land, and is claimable by grant or prescription (*o*). In prescribing, therefore, for common in gross, "one does not lay seizin of any land, but says that he and his ancestors, whose heir he is, &c., from time whereof, &c., have had common in the place where, &c., for all their cattle, without relation to any land, and without saying levant and couchant, because there is no land on which they can be levant and couchant, or to which the common can be appurtenant, wherefore a prescription for common in gross without number is good" (*p*). Common in gross being a personal privilege, and not a right appendant or appurtenant to land, cannot be granted over so as to burthen the land for all time in the hands of subse-

(*m*) *Syms's* case, 8 Co. 54a.
(*n*) *Swayne's* case, 8 Rep. 63b. *Brown's* case, 4 Co. 21b. *Benson* v. *Chester*, 8 T. R. 401.
(*o*) Co. Litt. 122a.
(*p*) *Mellor* v. *Spateman*, 1 Wms. Saund. 346.

quent owners and occupiers of the land over which the right has been granted (*q*).

If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture estovers, or the like, this is a prescription or custom against the law to exclude the owner of the soil, for it is against the nature of this word common. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ*, from such a day till such a day, and hereby the owner of the soil shall be excluded for the time to pasture or feed there. So, a man may prescribe to have *separalem pischariam* in such a water, and the owner of the soil shall not fish there (*r*). The customary tenants in whom these exclusive rights, exerciseable during certain portions of the year, are vested, have merely a profit à prendre *in alieno solo*, and no estate in the soil itself (*s*), but the interest is capable of transfer by deed of assignment. "Instances of sole pasturage are to be found on the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the north of England" (*t*).

Rights of sole and several pasturage— Cow-grasses and cattle-gates.—In some manors, the customary tenants of the customary tenements of the manor have a right to the sole and several pasturage for the whole year over the moors and downs and waste places of the manor, to the entire exclusion of the lord of the manor, and may by deed license strangers to put in their cattle (*u*), and sell and convey away their interest to another. These rights of sole and several pasturage are called cattle-gates and cow-grasses, and are customary estates of inheritance, transferable by deed. The owners of them have no right of property in the soil. They are held of the lord of the manor, according to the custom of the manor, as customary estates of inheritance, by payment of fine and customary rents and under dues, duties, suits and services, regulated by the custom. They are transferred by customary deeds, followed by admittance at the next lord's court, or out of court by the steward of the manor, and a fine is payable on admittance. These cattle-gates, therefore, are copyhold tenements (*x*).

Rights of tinbounders to search for tin in Cornwall are founded on custom. The right seems to have originated in each instance in a virtual contract, as in the case of rights of common. When the lord, or owner of waste uninclosed and uncultivated land, would not search for and work tin himself, or devote his waste exclusively to other purposes by inclosure, he has permitted the tinner to enter on the waste and work

(*q*) Ante, p. 77. Treby, C. J., *Weekly* v. *Wildman*, 1 Ld. Raym. 407.

(*r*) Co. Litt. 122b., *North* v. *Cox*, 1 Lev. 253.

(*s*) *Rex* v. *Churchill*, 4 B. & C. 750.

(*t*) Ld. Abinger, *Welcome* v. *Upton*, 6 M. & W. 536.

(*u*) *Hoskins* v. *Robins*, 2 Wms. Saund. 323.

(*x*) *Rigg* v. *Earl Lonsdale*, 1 H. & N. 935.

for and get tin, on condition of the render to him of a certain portion, fixed by custom, of the produce of the tin mine. Here, as in the instance of a right of common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it, in justice, cannot prescribe for it; from necessity, therefore, that the right may not be defeated, they are allowed to claim it by custom (*y*).

The lord, by his grant of common, gives every thing accessorial to the enjoyment of the right, such as ingress, egress, &c., and thereby authorizes the commoner to remove every obstruction to his cattle grazing the grass there. But the lord still remains owner of the soil, and a commoner who has a mere right of common of pasture has no power to meddle with the soil, and cannot cut even a trench or a ditch to let the water off the common, without first obtaining the license of the lord (*z*). And if the lord chooses to encourage the growth of beasts of warren, such as hares and rabbits upon the common, and to make rabbit-burrows, the commoner has no right to destroy either the hares, the rabbits, or the burrows. If they increase so as to destroy the herbage and deprive the commoners of the pasture, this may be a surcharge of the common by the lord; but the commoner must pursue the appropriate remedy by action, and cannot lawfully kill the conies, for, as long as they are in the lord's own land, the lord hath property in them, but, when they go out, he hath no longer property in them (*a*).

Inconsistent rights of common.— Where there are two distinct rights of common claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other? It may be either the lord's right, which is subservient to the commoners', or the commoners', which is subservient to the lord's. In general, one would say that the lord's is the superior right, because the property of the soil is in him; but if the custom established by evidence show that it is subservient to the commoners', then he cannot use the common beyond that extent; otherwise he subjects himself to an action for the excess (*b*).

Of the servitude of maintaining and repairing sea-walls, ditches, and sluices.—Every person who accepts a grant of land from the crown, accompanied by a command or direction to keep up, repair, and maintain certain buildings, sea-walls, ditches, and sluices, takes the land subject to the servitude imposed thereon; and if any private individual sustains a private and peculiar injury from the non-repair of the sea-walls, &c., he is

(*y*) *Rogers* v. *Brenton*, 10 Q. B. 26.

(*z*) *Cooper* v. *Marshall*, 1 Burr. 226; 1 Roll. Abr. 406.

(*a*) *Hadesden* v. *Gryssell*, Cro. Jac. 195. *Bellew* v. *Langdon*, Cro. Eliz. 876. *Carrill* v. *Pack*, 2 Bulstr. 115. *Hoddesdon* v. *Gresil*, Yelv. 104.

(*b*) Buller, J., *Bateson* v. *Green*, 5 T. R. 416.

entitled to an action against the grantee or his assigns, failing to fulfil the duty imposed upon him or them (*c*).

Of customary rights of fishing, and driving stakes for nets in the sea-shore.—The land between ordinary high-water mark and low-water mark belongs to the crown, in the absence of proof of a grant of such land to a lord of a manor or to a private person (post, ch. 6, s. 2); but various customary and prescriptive rights and privileges over the sea-shore have grown up and been acquired by the public, and by communities and private individuals, by reason of immemorial usage and enjoyment. Where an action of trespass was brought against a defendant for digging in the plaintiff's land, and the defendant pleaded that the *locus in quo* was four acres of land adjoining the sea, and that all the men of Kent, from time immemorial, have used when they have fished in the sea to dig in the land adjoining, and pitch stakes for hanging their nets to dry, it was held that such a custom, confined to the sea-shore, might be good; for, observes Clarke, C. J., "If I have land adjoining the sea, so that the sea ebbs and flows on my land, when it flows every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right; and when the sea has ebbed, then in this land which was flowed before, peradventure he may justify his digging, for this land is of no great profit" (*d*).

Customary and prescriptive rights of bathing on the sea-shore.—There is no general common law right of bathing in the sea, and passing over every part of the shore for that purpose, independently of usage and custom; but such a right may exist by prescription or custom, and may be gained and retained by the owners and occupiers of houses on the sea-coast, or by the inhabitants of any village, parish, or district, so long as it can be exercised without creating any public nuisance (*e*). The existence and the extent of the right are to be collected in this, as in other instances of customary and prescriptive rights, from the manner in which the particular portions of the sea-shore throughout the kingdom have from time immemorial been used. "The right of bathing in the sea," observes Best, J., "is as beneficial to the public as the right of fishing, and unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold, on principles of public policy—I might say public necessity—that the interruption of free access to the sea is a public nuisance. In the first ages of all countries the sea and its shores were left open to public use. In all countries it has been matter of just complaint that individuals have encroached on the rights of the people. In England our ancestors put the public rights in rivers under the safe-

(*c*) *Henly* v. *Mayor of Lyme*, 5 Bing. 107.

(*d*) 8 Edw. 4, 19. Bro. Abr. Customs, 46.

(*e*) *Rex* v. *Crunden*, 2 Campb. 89.

guard of *Magna Charta*. If the principle of exclusive appropriation be extended so far as to touch the right of walking over the barren sands of the sea-shore, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. It has been said, that lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are armed with authority to bring to punishment such as bathe indecently, and I would rather rely on disinterested and responsible magistrates than on an interested and irresponsible lord of a manor" (*f*).

Title by prescription is a title acquired by use and time, and allowed by law; as when a man claims to have a thing because he and his ancestors, or they whose estate he hath, have had or used it from time immemorial (*g*). All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath, which last is called prescribing in a que estate. If a man prescribes in a que estate (that is, in himself and those whose estate he holds), nothing is claimable by this prescription but such things as are incident, appendant, or appurtenant to lands; but if he prescribes in himself and his ancestors, he may prescribe for things in gross.

A prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the insufficiency of their estates; for, as prescription is usage beyond time of memory, those whose estates commenced within the remembrance of man cannot prescribe; and therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee simple.

Estates gained by prescription are not descendible to the heirs-general, but only to the blood of that line of ancestors in whom the party prescribes. But, if he prescribes in a que estate, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase (*h*).

Nothing but incorporeal hereditaments can be claimed by prescription, such as rights of way, rights of common, &c. No prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. Thus, a grant of a license to get coal or minerals, which does not oust the grantor of his right to dig for coal and minerals in the same land, is, as we have seen, a mere profit à prendre, or incorporeal right lying in grant (*i*), and may consequently be claimed by

(*f*) *Blundell* v. *Catterall*, 5 B. & Ald. 287; ante, pp. 32, 33.

(*g*) Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis, Co. Litt. 113a, 113b. *Ellis* v. *Mayor, &c. of Bridgnorth*, ante, p. 12.

(*h*) 2 Bl. Comm. 64. Roll. Abr. PRESCRIPTION B.

(*i*) *Chetham* v. *Williamson*, *Doe* v. *Wood*, ante, p. 80.

prescription; but a claim to take *all* the coal, to the exclusion of any right in the owner of the soil to get it, is a claim to a part of the soil itself, and cannot be claimed by prescription (*k*).

A prescription by immemorial usage can in general only be for things which may be created by grant, for the law allows prescriptions only to supply the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and allow such usage as evidence of a good title. Therefore, for such things as cannot be created at this day by any manner of grant, or reservation, or deed, a prescription is not good (*l*).

Prescriptive right to a pew in a church, as appurtenant to an ancient messuage, may be established by immemorial use and enjoyment. But if the plaintiff claims a prescriptive right, and shows the commencement of it in very modern times, his claim will fail (*m*).

Prescriptive rights founded on the presumption of a grant—Presumption of a grant from long-continued uninterrupted user and enjoyment as of right.—To raise a presumption of a grant of an easement or profit from long-continued uninterrupted enjoyment of the privilege, the enjoyment must have been open and notorious, and exercised as a matter of right, and not of grace and favour (ante, p. 64). Where, therefore, the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant or conveyance, there is no ground for presuming one. In the case of the continued enjoyment by one man of a right of common, or profit à prendre in the land of another, and in every user of a way, the original enjoyment must have been unlawful, unless the privilege had been exercised with the sanction and authority of the owner of the soil, and can only be accounted for on the supposition that a grant had been made; and when the enjoyment had been long continued, without interruption, a grant was presumed; but when the enjoyment of the privilege is accounted for, and is consistent with the fact of there having been no grant, the presumption does not arise (*n*).

When the property is of such a nature that it cannot be easily protected against intrusion, and, if it could, it would not be worth the trouble, proof must be given of constant uninterrupted user and enjoyment of the privilege, with the knowledge and acquiescence of the party interested in resisting intruders, in order to raise a presumption of a grant (*o*). According to the ancient law of prescription, the enjoyment was not unin-

(*k*) *Wilkinson* v. *Proud*, 11 M. & W. 33. *Clayton* v. *Corby*, ante, p. 64.

(*l*) *Potter* v. *North*, 1 Ventr. 387; 3 Cruise's Digest, tit. 31, ch. 1. *Att-Gen.* v. *Matthias*, 4 K. & J. 592; 27 Law J., Ch. 761.

(*m*) *Griffith* v. *Matthews*, 5 T. R. 296.

(*n*) *Doe* v. *Reed*, 5 B. & Ald. 236. *Livett* v. *Wilson*, 3 Bing. 118. *Boyle* v. *Tamlyn*, 6 B. & C. 337.

(*o*) *Att.-Gen.* v. *Chambers*, 5 Jur. N. S. Ch. 745.

terrupted, wherever it was had and exercised in spite of the remonstrance or prohibition of the owner of the fee (*p*). And whenever there was evidence to show that the user and enjoyment were had and exercised by permission, and grace and favour, there was no user and enjoyment as of right, and no prescriptive title could be gained thereby, however notorious and long continued might have been the user and enjoyment (*q*).

The general principle with regard to prescriptive rights founded on the presumption of a grant is, that a grant will not be presumed against an ignorant man, and, therefore, if an easement or profit à prendre has been enjoyed on land let on lease, the landlord is not to be prejudiced in his rights, and the inheritance burthened through the *lâches* or acquiescence of the tenants in matters affecting the inheritance, without the knowledge, and privity, and sanction of the landlord (*r*). "The foundation," observes Lord Ellenborough, "of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant, and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him" (*s*). But when the user and enjoyment are had and exercised under circumstances of notoriety, a jury may infer the landlord's knowledge and acquiescence in such user and enjoyment. Thus, where the lessees of a fishery had for sixty-four years been in the constant habit of landing their nets openly on a river-bank in the occupation of a tenant, and had from time to time sloped and pared the bank, and exercised various other acts of ownership upon the land, it was held that a jury was justified in inferring that the landlord knew of and acquiesced in the enjoyment of the easement (*t*). And where there had been an uninterrupted enjoyment for thirty-eight years of the free access of light and air to windows over and across land held on lease, it was held that the landlord's knowledge of and acquiescence in the enjoyment of the visible and apparent easement was fairly to be presumed, in the absence of evidence to the contrary (*u*).

If the user and enjoyment have been had and exercised with the sufferance and permission of the tenant, but in spite of the remonstrance, protest, or objection of the owner of the fee, no right can be gained by

(*p*) "Interrumpi poterit per denuntiationem et impetrationem diligentem, et per talem interruptionem nunquam acquirit possidens ex tempore liberum tenementum."—Bract. lib. 4, fol. 51, cap. 22.

(*q*) "Si autem precaria fuerit et de gratiâ, quæ tempestive revocari possit vel impestive, ex longo tempore non acquiritur jus."—Bract. lib. 4, fol. 221, ante, p. 64.

(*r*) See the observations of Lord Wynford, *Benest* v. *Pipon*, 1 Knapp, P. C. 70. *Davies* v. *Stephens*, 7 C. & P. 570. *Deeble* v. *Lineham*, 12 Ir. C. L. R. 16. "Si autem fuerit seisina clandestina, scilicet in absentiâ dominorum vel illis ignorantibus, et si scirent essent prohibituri, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet."—Bract. lib. 4, fol. 221; lib. 2, fol. 52.

(*s*) *Daniel* v. *North*, 11 East, 374. *Runcorn* v. *Cooper*, 5 B. & C. 701.

(*t*) *Gray* v. *Bond*, 5 Moore, 534.

(*u*) *Cross* v. *Lewis*, 2 B. & C. 686.

such an enjoyment, for there can be no presumption of a grant under such circumstances.

Proof of immemorial enjoyment of the privilege claimed was, in ancient times, essential to the legal presumption of a grant; but for a long series of years before the passing of the Prescription Act (post, p. 94), judges were in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume an ancient grant of an easement or profit à prendre from an uninterrupted enjoyment of the privilege as of right for twenty years, adopting that period by analogy to the Statute of Limitations.

Of the Prescription Act.— The uninterrupted enjoyment for twenty years of an incorporeal right, from which juries were allowed to presume an ancient grant was not a bar or title in itself; for if the commencement of the enjoyment within what was called the period of legal memory (*i. e.* the period of the return of Richard Cœur de Lion from the Holy Land) could be shown, the presumption of an ancient grant in times long since passed away was rebutted, and the right defeated. To remedy this inconvenience, and shorten in effect the period of prescription, and make that period of enjoyment of an incorporeal right a bar or title of itself, which was so before only by the intervention of a jury, the statute 2 & 3 Wm. 4, c. 71, was passed.

This statute, commonly called "The Prescription Act," recites (s. 1) that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters that had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was productive of injustice; it is therefore enacted that no claim which may be lawfully made at the common law by custom, prescription, or grant to any RIGHT OF COMMON, *or other* PROFIT *or* BENEFIT, *to be taken or enjoyed from or upon any land*, except such matters and things as are therein specially provided for; and, except tithes, rent, and services, shall, where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of THIRTY years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed within the time of legal memory, but that such claim may be defeated in any other way by which the same was then liable to be defeated; and when such right, profit, or benefit has been so taken and enjoyed for the full period of SIXTY years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the same statute (s. 2), it is enacted that no claim which may be lawfully made at common law, by custom, prescription, or grant to any

WAY OR OTHER EASEMENT, OR TO ANY WATERCOURSE, OR THE USE OF ANY WATER, to be enjoyed upon, over, or from any land or water, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of TWENTY years, shall be defeated or destroyed by showing only that such way, water, or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated; and when such way or other matter shall have been so enjoyed, as aforesaid, for the full period of FORTY YEARS, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement by deed or writing.

Also (s. 3), that when the ACCESS AND USE OF LIGHT to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of *twenty* years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding (*x*), unless it shall appear that the same was enjoyed by some covenant or agreement expressly made or given for that purpose by *deed or writing*.

Each of the respective periods named in the act is to be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall be brought in question (*y*), and no act or other matter is to be deemed to be an interruption (s. 4), unless the same shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made.

And (s. 5) that in all actions upon the case and other pleadings, wherein the party might then by law allege his RIGHT generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in the act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenements, in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee. In the several cases mentioned in and provided for by the act, no presumption is to be allowed or made (s. 6) in support of any claim, upon proof of the exercise or

(*x*) *Salters' Co.* v. *Jay*, 3 Q. B. 109. 855.
Truscott v. *Mercht. Taylors' Co.*, 11 Exch.

(*y*) *Cooper* v. *Hubbuck*, 9 Jur. N. S. 576.

enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in the act as may be applicable to the case and the nature of the claim.

The period during which a party capable of resisting the claim is an infant, idiot, *non compos mentis*, *feme coverte*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party thereto, is to be excluded (s. 7) in the computation of the periods mentioned, except only in cases where the claim is thereby declared to be absolute and indefeasible.

It is enacted also (s. 8), that when any land or water upon, over, or from which any right of way, or convenient watercourse, or use of water shall have been enjoyed or derived, hath been or shall be held under any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the determination of such term, be resisted by the reversioner.

What profits or benefits may be claimed by user and enjoyment under the Prescription Act.— Easements and profits à prendre cannot be claimed by user and enjoyment under the Prescription Act unless the benefit or profit has been used, exercised, and taken for the more beneficial use and enjoyment of some neighbouring tenement. Easements and profits in gross (ante, p. 77), therefore, cannot be claimed by an occupier as such under the act, because the claim must be "by custom, prescription, or grant," and it must be of such a nature as to be capable of being annexed to land, as being accessorial to the beneficial use, occupation, and enjoyment of landed property. A right, therefore, which can be of no benefit to any tenement, such as a right to cut down, and carry away, and sell trees or underwood growing on a neighbour's land, or to search for and raise minerals, and carry them away and dispose of them, cannot be prescribed for under the statute (*z*).

The second section of the statute has been held to include only such easements upon or over the surface of the servient tenement as are capable of being interrupted by the owner thereof, so as to prevent the enjoyment from ripening into a right. An enjoyment, therefore, for twenty years of the free and uninterrupted passage of wind to a windmill, does not impose upon the owners of the adjoining land the servitude of keeping their land open and free from buildings, in order that the wind may not be taken out of the miller's sails (*a*).

(*z*) *Bailey* v. *Stephens*, 12 C. B., N. S. 113; 31 Law J., C. P. 228. 13 ib. 841; 30 Law J., C. P. 384; 31 ib. C. P. 335.

(*a*) *Webb* v. *Bird*, 10 C. B., N. S. 268;

In order to gain a prescriptive title from uninterrupted user and enjoyment under the first and second sections of the Prescription Act, it must be proved that the enjoyment has been "as of right," for that is the form in which, by section 5 of the statute (ante, p. 95), the claim must be pleaded. It must be such an enjoyment as of right, and without interruption, as would under the old law of prescription have raised a presumption of a grant (*b*). "The whole purview of the Prescription Act," observes Lord Abinger, "shows that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim. It also requires it to be of right" (*c*). All circumstances, therefore, tending to rebut the presumption of a grant, and to prove that no grant could ever have existed, or have lawfully been made, are admissible in evidence to show that there was no enjoyment as of right within the meaning of the statute (*d*). Therefore, when lands are out on lease, an enjoyment by the acquiescence of the tenant, without the knowledge and acquiescence of the landlord or reversioner, cannot be made the foundation of a prescriptive right or title under the statute (*e*).

Enjoyment by consent or agreement.—The proviso in s. 1 of the Prescription Act, that the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing, supposes that there may be an enjoyment as of right, though by consent or agreement; but that applies to cases where the title to the dominant and servient tenements is such that the enjoyment could be as of right within the statute, not where from unity of possession or otherwise it necessarily cannot be. The enjoyment must be of right against the land, not against the individual (*f*).

User and enjoyment as of right against all persons having an estate or interest in the land.—A user and enjoyment which do not give a valid title as against the owner of the inheritance cannot give a title as against the lessee and the persons claiming under him, for no title at all can be gained by a user and enjoyment which do not give a valid title against all persons having estates in the land over or upon which the easement has been enjoyed (*g*).

(*b*) "Longus usus nec per vim, nec clam, nec precario."—Bract. lib. 4, fol. 222; Co. Litt. 114. *Bright* v. *Walker*, 1 C. M. & R. 219. Ante, p. 92.

(*c*) *Arkwright* v. *Gell*, 5 M. & W. 234. *Rigg* v. *Lonsdale*, 1 H. & N. 923; 25 Law J., Exch. 81.

(*d*) *Mill* v. *New Forest Co.*, 18 C. B. 60; 25 Law J., C. P. 215.

(*e*) Ante, pp. 93, 94. *Deeble* v. *Linehan*, 12 Ir. C. L. R. 16.

(*f*) *Warburton* v. *Parke*, 2 H. & N. 64; 26 Law J., Exch. 209.

(*g*) *Bright* v. *Walker*, 1 C. M. & R. 220. *Winship* v. *Hudspeth*, 10 Exch. 7; 23 Law J., Exch. 268. *Wilson* v. *Stanley*, 12 Ir. C. L. R. 356.

What sort of enjoyment is essential to the gaining of a prescriptive right of way.—Enjoyment of a way over land out on lease does not give any right of way as against the reversioner, unless the enjoyment has been had with his knowledge and acquiescence, so as to be an enjoyment "as of right." Thus, where a stranger entered on the land of the reversioner in the occupation of his lessee, and traversed the land with carts and horses in the exercise of an alleged right of way, it was contended that the trespass, being accompanied with a claim of right, would, if it continued unopposed by the reversioner, be evidence of a right of way as against him at some future period. "But acts of this sort," observes Taunton, J., "cannot operate as evidence of right as against the reversioner of land demised to tenants, because the reversioner, during the demise, has no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it: as, therefore, he had no remedy by law for the wrongful act done by the defendant, the act done by him, or any other stranger, would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee." In *Wood* v. *Veal* (*h*), it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired" (*i*).

Enjoyment of a right of common by a tenant over land in the possession and occupation of his landlord.—Where a tenant enjoyed a right of common appurtenant to a tenement rented by him over land which was possessed and occupied by his landlord as tenant for life, it was held that, as the landlord could not have an enjoyment as of right against himself, so neither could his tenant. All the tenant's rights were derived from his landlord, and whatever he enjoyed was enjoyed by grant from the latter, and such an enjoyment is not an enjoyment of right within the statute (*k*).

What sort of enjoyment is essential to the gaining of a prescriptive right to the use of any watercourse or water—Natural and artificial watercourses.—All persons having lands on the margin of a flowing stream have, *ex jure naturæ*, as we have seen (ante, p. 48), certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights;

(*h*) 5 B. & Ald. 454.
(*i*) *Baxter* v. *Taylor*, 4 B. & Ad. 75. *Daniel* v. *Anderson*, 31 Law J., Ch. 610.
(*k*) *Warburton* v. *Parke*, 2 H. & N. 64; 26 Law J., Exch. 298.

but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*l*).

When a mill has been erected upon a stream, and has stood there and been worked for the period of twenty years, it gives to the millowner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, alterations made prejudice the right of a lower mill, the case would be different (*m*).

Prescriptive right to pen back water.— If the water of a natural stream is conducted to the plaintiff's land by an artificial cut or channel made through the land of the defendant, and the plaintiff and the former occupiers of the plaintiff's land have for more than twenty years enjoyed this flow of water, and have from time to time during the period gone upon the defendant's land, and repaired the banks of the artificial cut, and cleaned it out, and placed stones and stakes, and maintained a dam in the natural stream for the purpose of penning back the water, and making it flow through the artificial watercourse, a prescriptive right to the flow of water and to the exercise of these customary acts will be gained (*n*).

Prescriptive rights to foul the pure water of a stream, and convert a natural watercourse into a sewer, may be gained by twenty years' uninterrupted user and enjoyment of the privilege. "The general rule of law," observes Lord Ellenborough, "as applied to this subject, is, that if a stream be corrupted in quality, as by means of the exercise of certain noisome trades, yet if the occupation of the stream by the party so taking or using it has existed for so long time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament" (*o*).

User and enjoyment of water from artificial drainage.— The circumstances under which a watercourse was originally made, and under which it has been subsequently enjoyed, may prove the enjoyment, however long continued, to have been without right, or any pretence or claim of right.

(*l*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 611; 26 Law J., Exch. 148.

(*m*) *Saunders* v. *Newman*, 1 B. & Ald. 261.

(*n*) *Beeston* v. *Weate*, 5 Ell. & Bl. 986; 25 Law J., Q. B. 115.

(*o*) *Bealey* v. *Shaw*, 6 East, 214. *Wright* v. *Williams*, 1 M. & W. 77. *Carlyon* v. *Lovering*, 1 H. & N. 789.

The artificial nature of an adit or watercourse, constructed for the purpose of draining a mine, and a notorious practice in mineral districts for the owners of mines to make watercourses for the purpose of draining their mines, and resume and discontinue the working of their mines at their own convenience, and according as it suits their interests, may fix all persons with the knowledge that those who cleared the mine by the adit notoriously reserved to themselves the right of working the mine at any time, with all the rights of fouling the water flowing from the mine with the dirt and rubbish which usually attend mining operations, so as to prevent parties who have taken advantage of the accidental non-user of the mine to use the adit-water from having an enjoyment as of right, and gaining a title to the use of the water uncontaminated by mining operations (*p*).

"The proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been artificial, is quite indefensible; but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created (*q*). The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down, or altered so as to diminish the quantity of water flowing from the roof. The flow of water for twenty years from a drain made for agricultural improvements, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right" (*r*).

If a steam-engine or sough is constructed and used by the owner of a mine to drain it, and the water pumped up by the engine, or collected by the sough, flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, no right to the water in perpetuity can be gained from any such user, so as to burthen the owner of the mine and his assigns with the obligation of keeping up the steam-engine or the sough, and pumping or collecting water for the benefit of the adjoining landowners. In cases of this sort

(*p*) *Magor* v. *Chadwick*, 11 Ad. & E. 585.
(*q*) *Sutcliffe* v. *Booth*, 32 Law J., Q. B. 136.
(*r*) Per Cur., *Wood* v. *Waud*, 3 Exch. 779.

no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the watercourse itself such a right may be acquired (*s*). If a farmer, by some system of drainage, draws off the rain-fall from his lands, and pours it into the plaintiff's ditch, and so creates a new and artificial supply of water, and the latter uses the water for more than twenty years, and after that the farmer adopts a new mode of drainage, and in so doing cuts off the artificial supply of water, the plaintiff has no remedy for the loss of the water, the supply being of a temporary character, and the circumstances showing that the one party never intended to give, nor the other to enjoy, the use of the artificial drainage-water as a matter of right (*t*).

What sort of enjoyment is essential to the gaining of a right of support to buildings from the adjoining land of a neighbouring proprietor.—When houses and buildings have been notoriously supported by the adjoining land of a neighbouring proprietor for the full period of twenty years, a right to such adjacent support is gained, unless something be shown to displace such right (*u*). A defendant who has acquiesced for more than twenty years in the enjoyment, by the plaintiff, of the privilege of lateral support from the defendant's adjoining soil, cannot afterwards lawfully interrupt the enjoyment of such privilege (*x*).

"There may be some difficulty," observes Lord Campbell, "whence the grant of the easement of support to a house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it, without serious loss or inconvenience to himself; but the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it; the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle" (*y*); but a grant ought not to be inferred from any lapse of time short of twenty years after the neighbour was, or ought to have been, fully aware of the facts. The easement must have been enjoyed for twenty years under a claim of right, "and if neither party was acquainted with the fact that the easement was actually used at all, we should probably," observes Alderson, B., "be of opinion that there was no user of the easement under a claim of right" (*z*).

(*s*) *Arkwright* v. *Gell*, 5 M. & W. 232.

(*t*) *Greatrex* v. *Hayward*, 8 Exch. 291. *Rawstron* v. *Taylor*, 11 ib. 369.

(*u*) Parke, B., *Hide* v. *Thornborough*, 2 C. & K. 255.

(*x*) Wood, V. C., *Hunt* v. *Peake*, 1 Johns. 710; 29 Law J., Ch. 785. *Brown* v. *Windsor*, 1 Cr. & Jerv. 27. *Rogers* v. *Taylor*, 2 H. & N. 828; 27 Law J., Exch. 175.

(*y*) *Humphries* v. *Brogden*, 12 Q. B. 749.

(*z*) *Partridge* v. *Scott*, 3 M. & W. 230.

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Houses resting against each other.—If two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to support from the other; and if the foundations of one of the houses subside, and the house rests upon the adjoining house, and requires the support of the latter, it does not follow that, because it has required and received that support for twenty years, any right to support is thereby acquired. Such a right cannot be claimed as a right by prescription, which supposes a state of things existing before the time of legal memory; nor is it a right under the Prescription Act, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is in fee simple; and it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbour, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, be subjected to the burthen of supporting and propping up the weak house after it has stood for twenty years: an enjoyment of such a privilege is not an enjoyment "as of right" within the Prescription Act (*a*).

What sort of enjoyment of the benefit of a boundary fence is requisite to gain a prescriptive right to have the fence kept up at the expense of one landowner for the benefit of another.—We have seen that the presumption of legal title by grant to easements and incorporeal rights in the lands of others is founded on adverse enjoyment of such rights from time immemorial. But where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant, there is, as we have seen, no ground for presuming one (ante, p. 92).

In the case, therefore, of proof of enjoyment by one landowner of a fence erected by his neighbour, and repaired, as occasion required, by the latter, there is no proof of such adverse enjoyment as raises a presumption of a grant of the benefit of the fence by one landowner to the other. Every man is bound by law to take care that his beasts do not trespass upon the lands of his neighbours. He may prevent their doing so, either by employing servants to keep them within the limits of his own land, or by inclosing his land with fences, so that the cattle cannot escape. The making of a fence, therefore, between his own land and that of his neighbour, does not raise any inference that the fence was intended for the benefit of his neighbour, although the fence prevents his neighbour's beasts from trespassing as well as his own; for it is for his own benefit to prevent his beasts from trespassing upon his neighbour's property (*b*).

What sort of enjoyment is essential to the gaining of a prescriptive right to the access of light to windows.—The third section of the Prescription

(*a*) *Solomon* v. *Vintners' Co.* *Peyton* v. *Mayor of London.* *Kempston* v. *Butler,* ante, p. 74.

(*b*) *Boyle* v. *Tamlyn,* 6 B. & C. 337.

Act provides, as we have seen, that where the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom or usage to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing. "This section," observes Parke, B., "is differently worded from the others, and the acquisition of right to light is much favoured, as a far less time gives an indefeasible right; and the proviso in the 7th section (ante, p. 96), which excludes the time when a person, otherwise capable of objecting, is an infant, idiot, *non compos*, *feme coverte*, or tenant for life, from other periods of computation, includes it in this. It also differs from the 2nd section, in not requiring that the enjoyment should be by a person 'claiming right' in express terms. What, then, is the enjoyment contemplated by the 3rd section? We think it clear, notwithstanding the absence of the words in the 2nd section above referred to, that it converts into a right such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing, in this respect, as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights. In the first place, the access of light under this section must have been enjoyed for twenty years without interruption —not in the sense of an uninterrupted or continuous user, but without such interruption as is mentioned in the subsequent section—that is, an interruption submitted to for one year after the party shall have had notice thereof, and of the persons making or authorizing the same to be made (*c*). From this it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time" (*d*).

Where, therefore, the owner in fee of an ancient house, and the land surrounding it, having enjoyed the access of light to his windows across such adjoining land, his own property, for more than twenty years, sells such surrounding land, and the purchaser builds thereon, so as to shut out the light from the ancient house, the owner has no remedy, as his enjoyment being over his own land is not such an enjoyment as is contemplated by the statute (*e*).

If windows have been enjoyed, subject to the payment of a rent, this

(*c*) *Flight* v. *Thomas*, 8 Cl. & Fin. 231.
(*d*) Parke, B., *Harbidge* v. *Warwick*, 3 Exch. 556; 18 Law J., Exch. 245.
(*e*) *White* v. *Bass*, 7 H. & N. 722; 31 Law J., Exch. 283.

is an enjoyment by consent or agreement, and therefore confers no right under the statute; but the payment of the rent is no evidence of any interruption of enjoyment (*f*).

Unity of ownership of the dominant and servient tenements preventing the acquisition of a prescriptive right to the free access of light.—If the house and windows and the adjoining premises over which light comes are in the possession of the same person, no grant can be presumed from the enjoyment of the light in that condition of the property, and no right to the light can be acquired, as we have just seen, under the statute by reason of such enjoyment (*g*). Therefore, where the plaintiff and his father, whom he succeeded, had occupied a house, of which they were successively seised in fee for more than sixty years, and had also, during the whole period of their occupation of the house, occupied an adjoining garden as tenants from year to year under three successive landlords, of which the defendant was the last, and the light came to the windows of the house across this garden, and the defendant, having determined the yearly tenancy, and got possession of the garden, began to raise the garden-wall, and in doing so obstructed the windows of the plaintiff's house, it was held that the enjoyment of the light across the garden, during the unity of possession of the house and garden, was not such an enjoyment of light as could be made the foundation of a prescriptive right under the statute, and that the plaintiff consequently could not maintain any action for the obstruction of his windows (*h*).

Where, on the other hand, the windows and the land across which the light comes are in the occupation of different parties, and there is no unity of possession of the dominant and servient tenements, a prescriptive right would be gained by twenty years' uninterrupted enjoyment, although the servient land across which the light comes is held on lease (*i*). It is true, that if a man open a window on adjoining land out on lease, and the landlord or reversioner of that land objects to it, the latter may have no means of redress, or power of preventing the right to light being acquired by twenty years' enjoyment, unless he can induce his tenants to block up the windows, or get an acknowledgment in writing that the right is enjoyed by consent only; but such want of redress and inability of prevention will, nevertheless, not prevent the right from being acquired (*k*).

Enlargement of windows — Enjoyment of enlarged windows.—A party cannot, by enlarging a window, enlarge his right to the enjoyment of light. The enlarged portion of an ancient window constitutes a new window, and does not enjoy the same rights and privileges as the ancient

(*f*) *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630.
(*g*) *White* v. *Bass*, ante, p. 103.
(*h*) *Harbidge* v. *Warwick*, ante, p. 103.
(*i*) *Cross* v. *Lewis*, 2 B. & C. 686; ante, p. 103.
(*k*) *Frewen* v. *Phillips*, 11 C. B., N. S. 455; 30 Law J., C. P. 356.

aperture. If an ancient window is supplanted by a new window, varying in size, elevation, or position, from the ancient window, the new window may be obstructed by the adjoining landowner, but not the space occupied by the ancient aperture (*l*). If a window has been enlarged and then obstructed, and the window is then reduced to its ancient size, the obstruction becomes unlawful as soon as the window has been restored to its former state (*m*).

What interruption in the enjoyment prevents the acquisition of a title by prescription.—By s. 4 of the Prescription Act, it is enacted, that no act or other matter shall be deemed to be an interruption, unless the same shall have been submitted to or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making the same, or authorizing the same to be made. Where, therefore, the use of light and air had been enjoyed for nineteen years and three hundred and thirty days, and was then interrupted by the erection of a building, which interruption continued to the time of the commencement of the action, but the interruption was not submitted to or acquiesced in, as the plaintiff brought his action within a few months thereof, it was held that such erection of a wall was not an interruption preventing the establishment of the right within the terms of the fourth section of the statute (*n*). But though an interruption must be acquiesced in for a full year before it breaks the period; where the subject-matter has, previously to the interruption, been enjoyed as of right, interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment as of right. Such interruptions are explanatory of the real nature of the user. If the enjoyment has been contentious, it is not of right. Therefore, where a party had been summoned, and convicted, and fined, for drawing off water from a watercourse, it was held that the conviction and fine, and payment of the fine, were proper and most material evidence of the user and enjoyment not having been of right (*o*).

Of the necessity of a continuous enjoyment as of right and without interruption.—The enjoyment of the profit à prendre, or easement, must be an enjoyment for a continuous period, without such interruption as is defined in the fourth section of the statute. "To hold," observes Parke, B., "that the words of the statute might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last

(*l*) *Blanchard* v. *Bridges*, 4 Ad. & E. 191. *Chandler* v. *Thompson*, 3 Campb. 80. *Martin* v. *Goble*, 1 ib. 323. *Hutchinson* v. *Copestake*, 9 C. B., N. S. 863; 31 Law J., C. P. 19. *Cooper* v. *Hubbuck*, 7 Jur. N. S. 457; 9 W. R. 352. *Davies* v. *Marshall*, 7 Jur. N. S. 720; 9 W. R. 352. *Turner* v. *Spooner*, 30 Law J., Ch. 801; 1 Drew & Sm. 467. And see *Extinguishment of Easements*.

(*m*) *Jones* v. *Tapling*, post, p. 112.

(*n*) *Flight* v. *Thomas*, 11 Ad. & E. 699; 8 Cl. & Fin. 241.

(*o*) *Eaton* v. *Swansea Water Co.*, 17 Q. B. 267.

continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the statute (*p*). Some act of user must take place within each year; for one of the clauses in the statute says, that no act or other matter shall be deemed an interruption, unless submitted to or acquiesced in for one year (ante, p. 95), which evidently points to that description of right which is exercised at least once a-year, and which, if interrupted for a year, is defeated" (*q*).

But where proof was given of the enjoyment of a profit à prendre at the time of the commencement of an action, and for thirty years before, but enjoyment during the whole of the intermediate period could not be proved, it was held to be a question for a jury, whether at that time the right had ceased, or was still substantially enjoyed. Thus, where there was an actual enjoyment of common of pasture for forty years next before the commencement of an action, with the exception of an interval of two years out of the forty, when the claimant ceased to use the common, because he had no commonable cattle to depasture, and not in consequence of any obstruction to his exercise of the right, it was held that the jury were justified in finding a continued enjoyment of the right during the two years in which it was not exercised (*r*). Where, on the other hand, an artificial impediment in the shape of a stang or rail had been erected, which prevented the access of cattle from the plaintiff's farm to the land over which the right of common was claimed, and this stang was removed by agreement, and then the plaintiff's cattle depastured on the land, and continued so to do for twenty-eight years continuously after the removal of the stang, down to the time of the commencement of the action, it was held that an enjoyment for thirty years could not be presumed from this evidence (*s*).

What breaks the continuity of the enjoyment—Asking leave.—"The asking leave from time to time breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right" (*t*).

Of the necessity of a continuous enjoyment down to the period of the commencement of the action.—The Prescription Act expressly requires (ss. 1, 2) enjoyment "without interruption for the full periods therein mentioned." S. 6 enacts, that no presumption shall be allowed in support of any claim on proof of enjoyment for any less period or number of years; and by s. 4

(*p*) *Onley* v. *Gardiner*, 4 M. & W. 500.
(*q*) *Lowe* v. *Carpenter*, 6 Exch. 831.
(*r*) *Carr* v. *Foster*, 3 Q. B. 581; post, p. 113.
(*s*) *Bailey* v. *Appleyard*, 8 Ad. & E. 165.
(*t*) *Tickle* v. *Brown*, 4 Ad. & E. 382. *Bright* v. *Walker*, 1 Cr. M. & R. 219.

it is enacted, that each of the respective periods of years thereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be, brought in question. It has accordingly been held that the enjoyment, in order to give a right under the statute, must be up to the time of the commencement of the suit, not up to the time of the act complained of; and, consequently, that an enjoyment for twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit" (*u*). But when a prescriptive right has once been gained by twenty or thirty years' uninterrupted enjoyment as of right, it is not lost again by non-user for one or more years, if the non-user is accounted for and explained by circumstances showing that the right was not abandoned, though it was not exercised, either because there was no occasion for its exercise (*x*), or because of some temporary substitute having been provided, or of some temporary arrangement or understanding having been made between the owners of the dominant and servient tenements, keeping the right in suspension or abeyance, but not extinguishing it.

An exercise of the right once a-year down to the time of the commencement of the action is not, therefore, in all cases, essential to the proof of a prescriptive title. Thus, where there had been an immemorial enjoyment of a right of way by the defendant across the plaintiff's close, and the defendant ceased to exercise his right, and to use and enjoy the way for a great number of years, because he had obtained leave to use a more convenient way, it was held that the non-user, under such circumstances, of the ancient way did not deprive him of his prescriptive right, and that he was entitled to resort to the old way, although he had not used it for several years next before an action against him was commenced (*y*). When a new track has been substituted for the ancient path by parol agreement for an indefinite time, "the user of the substituted way," observes Patteson, J., "may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it" (*z*). It has been said that, as a prescriptive right of way or of common can only be acquired by twenty or thirty years' enjoyment, it ought not to be lost without disuse for the same period; but it has been held that the period of disuse is only one element from which the grantee's intention to retain or abandon his easement is to be inferred, and that no particular

(*u*) *Ward* v. *Robins*, 15 M. & W. 242. *Battishill* v. *Reed*, 18 C. B. 705; 25 Law J., C. P. 290. *Parker* v. *Mitchell*, 11 Ad. & E. 788. *Cooper* v. *Hubbuck*, 9 Jur. N. S. 575.

(*x*) *Carr* v. *Foster*, 3 Q. B. 581.

(*y*) *Ward* v. *Ward*, 7 Exch. 838; 21 Law J., Exch. 334. *Carr* v. *Foster*, 3 Q. B. 581.

(*z*) Patteson, J., *Payne* v. *Shedden*, 1 Mood. & Rob. 383. Littledale, J., *Moore* v. *Rawson*, 3 B. & C. 339; post, p. 112.

period of disuse can be relied upon as proof of an extinguishment of the easement (*a*).

Exclusion from the computation of the thirty and twenty years' enjoyment of those periods during which parties otherwise capable of resisting the claim were infants, idiots, feme covertes, or tenants for life.— The seventh section of the Prescription Act provides, as we have seen, that the time during which any person otherwise capable of resisting the claim shall be an infant, *non compos mentis*, *feme coverte*, or tenant for life, shall be excluded from the computation of the respective periods, except where the claim is thereby declared to be absolute and indefeasible. The claim is by the statute declared to be absolute and indefeasible in those cases where there has been an enjoyment as of right and without such interruption as is mentioned in s. 4 of a way, watercourse, or use of water, or other easement, for the term of forty years, and of a profit à prendre for the term of sixty years, and of the access and use of light and air to any dwelling-house, workshop, or other building for twenty years, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Where a defendant claiming a prescriptive right to the enjoyment of a profit à prendre in the soil of the plaintiff showed an uninterrupted enjoyment for twenty years before a life estate, and during its continuance, and for six years after its determination up to the commencement of the action, and the question was whether that enjoyment was sufficient, or whether the thirty years must be the actual thirty next before the commencement of the action, it was held that the two sections of the statute, viz. s. 4, enacting that the respective periods of enjoyment should be deemed and taken to be the period next before some suit or action, and s. 7, providing that the time during which any person capable of resisting the claim was tenant for life, &c., were to be excluded in the computation, must be read together, so that the period is thirty years next before the action, excluding in the computation of those thirty years any tenancy for life (*b*).

Of the right of reversioners to exclude from the computation of the forty years the periods of the enjoyment of a way or watercourse, and use of water over lands demised for life or years.— By s. 8 of the Prescription Act (ante, p. 96), it is expressly enacted, that when any land or water upon, over, or from which any right of way or convenient watercourse, or use of water, shall have been enjoyed or derived, hath been or shall be held under any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded

(*a*) Post, pp. 109–115. (*b*) *Clayton* v. *Corby*, 2 Q. B. 824.

in the computation of the said period of forty years, in case the claim shall within three years next after the determination of such term be resisted by the reversioner.

By the ancient law of prescription, whenever it appeared that the land over or upon which an easement of this sort had been enjoyed was in the occupation of a tenant for life, or tenant for term of years during the whole period of the enjoyment of the privilege, the presumption of a grant was rebutted and the easement extinguished, however long and notorious might have been the user and enjoyment, and although the owner of the fee was fully aware of all that had been done upon the land (*c*), and had made no protest against, or objection to, the enjoyment of the privilege. But, since the Prescription Act, if the privilege has been enjoyed without such interruption for forty years, the right cannot be defeated merely by showing that the land was on lease during the whole period of enjoyment. It must be shown either that the enjoyment was had without the knowledge of the reversioner (ante, p. 93), or that the reversioner, within three years after the determination of the particular estate, resisted the claim to the easement (*d*).

"The period during which the land over which the right is claimed has been leased for a term exceeding three years is not, under s. 8, to be excluded from the computation of a twenty years' enjoyment. Sect: 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the 'periods' thereinbefore mentioned; and a twenty years' enjoyment is one of those periods. But s. 8 provides for the exclusion of certain other times, among which is a tenancy for more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years" (*e*).

Waiver and extinguishment of easements—Parol abandonment of incorporeal rights.—Where an easement is granted for a particular purpose, or arises as accessorial to a thing granted (ante, p. 68), and the purpose can no longer be accomplished, or the thing granted ceases to exist, so that the easement can no longer be applied to the object for which it was originally granted, the easement is at an end (*f*). A mere parol license or agreement will suffice for the destruction, although it is insufficient (ante, p. 23) for the creation of an easement. Thus, if a person possessed of an easement over the land of the adjoining landowner verbally authorizes the latter to do an act of notoriety upon his own land which, when done,

(*c*) *Bradbury* v. *Grinsell*, 3 Saund. 175, (i,) in notis. *Barker* v. *Richardson*, 4 B. & Ald. 581. *Wood* v. *Veal*, 5 ib. 456.

(*d*) *Wright* v. *Williams*, 1 M. & W. 100. *Wilson* v. *Stanley*, 12 Ir. Com. Law Rep. 357.

(*e*) Ld. Campbell, *Palk* v. *Skinner*, 18 Q. B. 574; 22 Law J., Q. B. 27.

(*f*) *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; 28 Law J., Exch. 185.

will be inconsistent with the continued enjoyment of the easement, and the license or authority is acted upon, and the thing done, the authority so given and acted upon cannot be revoked, and the easement consequently is extinguished. Where the plaintiff, for example, having a right to the uninterrupted access of light and air across the defendant's area, had given the defendant a parol license or permission to put a skylight over his area, and the skylight was erected by the defendant on his own land, and, when built, was found to impede the passage of the air and light, and to obstruct the plaintiff's easement, it was held that, as the parol license or permission had been acted upon and executed, and the skylight built, the license was irrevocable, and the easement was extinguished (*g*).

So where the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant a parol license or permission to lower the banks of the river, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, it was held that the plaintiff, after he had so given up his right to the water that had been diverted, and suffered the defendant to act upon the faith of such relinquishment, and incur expense in doing on his own land the very thing that was authorized by the plaintiff to be done, could not then lawfully retract such consent, and throw on the defendant the burthen of restoring things to their former condition (*h*).

The same rule prevails in the civil law. In the "Digest," for example, it is laid down, that "if I have a right of discharging my eaves'-droppings into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way" (*i*).

Waiver and extinguishment of an easement of light and air.—If a party entitled to an easement of light and air does any act of notoriety showing that he abandons the benefit of the light and air he enjoyed, he may lose his right in a much less period of time than would suffice to enable him to gain it. Where the owner of a building with ancient windows overlooking the defendant's premises pulled down the building, and erected another with a blank wall without any windows, and fifteen years afterwards the defendant erected a building next this blank wall, and the plaintiff then opened windows in the blank wall in the place where his ancient windows formerly stood, and then brought an action against the defendant for the obstruction to the light and air caused by the defendant's

(*g*) *Winter* v. *Brockwell*, 8 East, 309.

(*h*) *Liggins* v. *Inge*, 5 M. & P. 712. 7 Bing. 682. *Blood* v. *Keller*, 11 Ir. Com. Law Rep. 130.

(*i*) "Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in eâ areâ ædificandi, stillicidii immittendi jus amitto. Et similiter si per tuum fundum via mihi debeatur, et permisero tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ."—Dig. lib. 9, tit. 6, l. 8.

new building, it was held that the windows thus opened could not claim the privileges of the ancient windows which had formerly existed on the same spot; that those privileges had been lost by manifest disuse, and that the action was not maintainable (*k*).

If a window has been bricked up for twenty years, it is, when re-opened, to all intents and purposes, a new window (*l*). But if the facts show that the windows were only temporarily disused, that the frames and sashes were kept in, or the spaces filled with a temporary hoarding, which could readily be removed, the owner of the window-spaces will not have lost his right to the easement of light and air by the disuse of the windows for any period short of twenty years; but if the window-spaces are obliterated and bricked up, and the adjoining landowner is permitted to build against them, and to incur expense, in the reasonable belief that the windows had been permanently abandoned, the owner of the windows cannot then insist upon his ancient right, and claim damages for an injury which has been brought about by his own negligence and want of care (*m*).

If a tenant stops up any of the windows of a house that has been demised to him, he is responsible in damages to his landlord (*n*).

Extinguishment of an easement of light by alterations in windows and buildings.—A party may so alter ancient windows and apertures through which light has been admitted into the interior of a building as to lose his right altogether. He may so change the course and direction of the light, and so alter the position of his windows, as to entitle the owner of the adjoining land to block them up altogether (*o*). If windows have been allowed to be opened, with blinds attached to them sloping upwards, so as to admit the light but obstruct the view over the adjoining land, the right to light which these windows may have acquired by user cannot be enlarged by removal of the blinds. If the blinds are removed, the view from the windows may be obstructed, provided the obstruction causes no greater impediment to the light than was caused by the old blinds (*p*). But, in equity, it has been held that a party possessed of ancient windows has a right to the full benefit of all the light he can get through the ancient aperture by any change he can effect in the form and character of the window. If it is an ancient window, with heavy mouldings, and small diamond panes glazed in lead, he may remove them, and substitute a large pane of plate glass, without giving the occupier of the servient tenement a right to block up the window, on the ground that the ancient right has been enlarged, and a new easement created, for this is only an alteration in the mode of enjoying the light within the house, and does

(*k*) *Moore* v. *Rawson*, 3 B. & C. 332.
(*l*) *Lawrence* v. *Obee*, 3 Campb. 514.
(*m*) *Stokoe* v. *Singers*, 8 Ell. & Bl. 39; 26 Law J., Q. B. 257.
(*n*) *Thomlinson* v. *Brown*, Sayer, 215.
(*o*) *Garritt* v. *Sharp*, 3 Ad. & E. 330.
(*p*) *Cotterell* v. *Griffiths*, 4 Esp. 69.

not vary the size of the external aperture; and if ancient windows have been painted on the inside, and so used, and the paint is rubbed off, this will not entitle the occupier of the servient tenement to block up the unpainted windows (*q*).

If, by the alterations which the plaintiff has made, he has exceeded the limits of his ancient right to light, and has put himself into such a position that the excess of light gained by him cannot be obstructed by the defendant, in the exercise of his lawful rights on his own land, without at the same time obstructing the ancient right of the plaintiff, the latter will lose his ancient right altogether, unless he restores his windows to their former state. Thus, where the plaintiff and defendant had houses on opposite sides of a narrow court, and the plaintiff rebuilt his house on the old foundations, but raised it a story higher, putting therein new windows, and altering the dimensions of all the windows in the lower stories, and the defendant then raised his house to the same elevation as the plaintiff's, and thereby darkened and obstructed both the new windows in the plaintiff's new story and all the windows in his lower story, it was held that, as the primary cause of the plaintiff's misfortune was his own act, in raising his own house and opening new windows, he had no ground to complain. "We by no means say," observe the Court, "that where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to the window in its new state, and would have been an obstruction to it in its former state. If the wall in which the window is be on the extremity of the owner's land, and the window is enlarged at the lower part of it, the owner of the adjoining land could obstruct the unprivileged part of the window, but would not be justified in building a wall which would obstruct the whole window. But in this case there was no mode of obstructing the new and unprivileged windows and portions of windows without obstructing the whole of them" (*r*). But where enlarged windows have been obstructed, and the windows are restored to their ancient state, the obstruction becomes unlawful as soon as the restoration has been effected, for the mere attempt to increase the servitude will not work a forfeiture of the right (*s*). And if new or enlarged windows can be obstructed without at the same time obstructing ancient, unaltered windows, an obstruction to such last-named windows cannot be justified; neither can an obstruction to a lower window be justified merely on the ground that

(*q*) Kindersley, V. C., *Turner* v. *Spooner*, 1 Drew & Sm. 467; 30 Law J., Ch. 803.

(*r*) *Renshaw* v. *Bean*, 18 Q. B. 132; 21 Law J., ib. 219. *Hutchinson* v. *Copestake*, 9 C. B., N. S. 863; 31 Law J., C. P. 19. *Weatherby* v. *Ross*, 32 Law J., Ch. 128. *Jones* v. *Tapling*, 9 Jur. N. S. 463.

(*s*) Erle, C. J., and Williams, J., *Jones* v. *Tapling*, 11 C. B., N. S. 289; 31 Law J., C. P. 119–121; ib. C. P. 342; 32 ib.; 9 Jur. N. S. 463, Ex. Ch.

an upper window has been enlarged, or a new garret window has been thrown out (*t*).

Disuse of right of way.—The presumption of abandonment of a right of way does not arise from the mere fact of non-user, when nothing has been done adverse to the user, and no obstruction has been offered to the enjoyment of the right. Thus, where an immemorial right of way had been enjoyed by the defendant from the defendant's close across the adjoining land of the plaintiff to the high road, and the defendant had demised his close to the plaintiff, and after that to several other tenants, who obtained by leave and license of the plaintiff and others a more easy and convenient access to and from the property, and the old prescriptive way was consequently disused for a great many years, it was held that the prescriptive right was not extinguished by the non-user (*u*). The use of the new track may, as we have seen, be considered as an exercise of the old right (*x*). When, therefore, a new way has been substituted by agreement of the parties in lieu of an old prescriptive way, and the new way is stopped, the old prescriptive right of passage revives (*y*).

If the jury find the right of way once well commenced, it must be shown that it has subsequently been released, abandoned, or destroyed. An express release of the easement would of course destroy it at any moment; so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser of enjoyment as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him and the intention in him which either the one or the other indicates. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances (*z*).

A private right of way is not extinguished by the subsequent dedication of the way to the public (*a*).

Extinguishment of ways of necessity.—A way by necessity is commensurate only with the existence of such necessity, so that when the necessity ceases the right of way also ceases. Where, therefore, a party who has a way of necessity over the lands of another is able to approach the land for which the way was used by passing over his own soil, the right of way is extinguished. "When, by a subsequent purchase, he is enabled to reach his house, farm, or field, without touching the land of his neigh-

(*t*) *Binckes* v. *Pash*, 11 C. B., N. S. 342; 31 Law J., C. P. 121; ib. C. P. 347, 350.

(*u*) *Ward* v. *Ward*, 7 Exch. 838.

(*x*) *Payne* v. *Shedden*, ante, p. 107.

(*y*) *Lovell* v. *Smith*, 3 C. B., N. S. 120.

(*z*) *Reg.* v. *Chorley*, 12 Q. B. 519. *Williams* v. *Eyton*, 27 Law J., Exch. 176; 2 H. & N. 771.

(*a*) *Duncan* v. *Louch*, 6 Q. B. 904.

bour, the necessity of going upon the land of the latter ceases, and, the necessity ceasing, the right founded upon such necessity ceases also" (*b*). But the easement revives again when the necessity for it revives (*c*).

Suspension and forfeiture of rights of way and watercourse by the non-performance of conditions annexed to the grant.—If a right of way is granted to another, he contributing and paying his rateable share and proportion of the expense of repairing the way, and repairs become necessary, and the way is repaired by the grantor, and the grantee refuses to pay his rateable proportion of the expense, his right of way will become forfeited, or will be suspended until the accomplishment of the condition annexed to the grant; but the grantee has the right to use the way without paying anything until repairs become necessary, and the cost of them has been ascertained, and the grantee has refused to pay his share of the cost (*d*). If a right of watercourse is granted, with certain limitations and restrictions, and the grantee exceeds his limited right, and refuses to conform to the restrictive conditions, he loses his right altogether, until he makes his enjoyment of it conformable to the conditions of the grant (*e*).

Disuse of right to water.—A person who has a prescriptive right to a flow of water to a pond or well does not lose his right merely because he has ceased to use his pond or well, and has allowed it to become choked with weeds (*f*).

Merger and extinguishment of easements and servitudes by a unity of ownership of the dominant and servient tenements.—Easements, profits à prendre, and servitudes, may become merged and extinguished in the general rights of property, when the land benefited by, and the land burthened with, the easement, profit, or servitude, pass into the hands of one common proprietor, or when the person possessed of the incorporeal right becomes the owner of the land over or upon which the right is exercised, for a man cannot, strictly speaking, have an easement in his own land. Thus, if one man erects on his own land a building which wrongfully darkens the windows of the adjoining proprietor, and afterwards purchases the house with the darkened windows, the tort is thenceforth purged by the unity of ownership, and the easement or privilege of enjoying the unobstructed access of light and air annexed to the darkened windows is extinguished, for both houses being in the hand of one person, he may deal with them as it seemeth best to him. If, therefore, he afterwards grants or conveys the house with the darkened windows, the grantee cannot lawfully complain of the nuisance, and has no remedy for its abatement. If one of two houses, which belonged to two different pro-

(*b*) *Holmes* v. *Goring*, 9 Moore, 180; 2 Bing. 76.
(*c*) *Pearson* v. *Spencer*, 1 B. & S. 584; post, p. 116.
(*d*) *Duncan* v. *Louch*, 6 Q. B. 904.
(*e*) *Cawkwell* v. *Russell*, 26 Law J., Exch. 34.
(*f*) *Hale* v. *Oldroyd*, 14 M. & W. 792.

prietors, has been built so as wrongfully to overhang the other, and they afterwards come into one hand, the wrong is now purged; so that if the houses come afterwards again into several hands, yet neither party can complain of the wrong done before (*g*).

The obligation imposed in certain cases by custom, prescription, or contract, upon the owner of an estate to maintain a fence for the benefit of the owner or occupier of the adjoining land, is an obligation in the nature of a servitude. Where, therefore, adjoining lands, which have once belonged to different persons, one of whom is bound to repair the fences between the two, afterwards becomes the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose (*h*).

If a man who has a right of common appurtenant (ante, p. 85) becomes himself the owner of the land over which the common extends, the incorporeal right is merged in the legal ownership, and the land is discharged, for a man cannot have common in his own land (*i*); and if the owner grants the land to which, before the extinguishment, the right of common was attached, with all easements and profits thereunto "appertaining" or "belonging," these words will not be sufficient to revive or re-create the right (*k*).

When a copyhold tenement, to which a right of common is annexed, becomes vested in the lord by forfeiture, the right of common is not extinguished: it remains by custom annexed to the customary tenement; and though the right is in abeyance whilst the estate remains in the lord, it is re-created or revived by a re-grant of the estate as a copyhold tenement *cum pertinentiis*. If, indeed, the lord grants the fee to a copyholder, the estate can never again become a copyhold estate, and the right of common is extinguished, "for the common first used was gained by custom, and annexed to the estate, and is lost with it" (*l*).

What sort of unity of ownership is essential to the extinguishment of easements.— For the extinguishment of a prescriptive right by unity of ownership and possession "it is requisite that the party should have an estate in the lands *a quâ*, and in the lands *in quâ*, equal in duration, quality, and all other circumstances" (*m*). "If," observes Alderson, B., "I am

(*g*) *Robins* v. *Barnes*, Hob. 131; Rolle's Abr. CUSTOMS (D.), pl. 7. *Battishill* v. *Reed*, 18 C. B. 696.

(*h*) Bayley, J., *Boyle* v. *Tamlyn*, 6 B. & C. 337.

(*i*) *Nelson's* case, 3 Leon. 128. *Saunders* v. *Oliffe*, Moore, 467. *Tyringham's* case, 4 Rep. 38 a.

(*k*) *Clements* v. *Lambert*, 1 Taunt. 204. *Grymes* v. *Peacock*, 1 Bulstr. 17.

(*l*) *Badger* v. *Ford*, 3 B. & Ald. 155. *Massam* v. *Hunter*, Yelv. 189.

(*m*) *Rex* v. *Hermitage*, Carth. 241.

seized of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seizin; and if I part with the premises, the right, not being extinguished, will revive" (*n*). If a lessor of the dominant tenement takes a week's tenancy of the servient tenement, he does not lose all the servitudes: he would only lose the statutory mode of establishing them; and he would only lose that when it could be said that at the time of granting the lease he could grant the servitude (*o*).

Things of necessity are not extinguished by unity of ownership, and therefore, a necessary way over land continues, notwithstanding a unity of ownership of the dominant and servient tenements, and subsequent conveyance of such tenements to separate proprietors (*p*); but this is not the case with regard to mere matters of convenience, such as the right of taking water from a pump (*q*).

Revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership.—When an easement or servitude has become extinct by reason of the ownership of the dominant and servient estates having become centered in the same person, and he again conveys away that estate to which the easement or servitude has belonged, the general rule is, that if he merely grants such estate with the appurtenances, the easement is not revived, unless it is a visible apparent easement, manifestly necessary for the commodious occupation and enjoyment of the property which is conveyed (*r*); but if he grants it with all easements, &c., therewith used and enjoyed, that operates as a revival; and any other words clearly intended to have such an effect will operate in the same manner. If a right of way has become extinguished by unity of ownership of the dominant and servient tenements, and the messuage for which the right of way was anciently used is subsequently severed from the land over which the way passed, and is conveyed "with all ways, roads, rights of road, paths, and passages thereto belonging, or in anywise appertaining," the extinct right of way is not revived, and does not pass by the conveyance of the house, unless it is a way of necessity (*s*); "for nothing is more clear than that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,'

(*n*) *Thomas* v. *Thomas*, 2 C. M. & R. 41.
(*o*) Bramwell, B., *Warburton* v. *Parke*, 26 Law J., Exch. 298; 2 H. & N. 64.
(*p*) *Packer* v. *Wellstead*, 2 Sid. 111. *Pearson* v. *Spencer*, 1 B. & S. 584.
(*q*) *Polden* v. *Bastard*, 2 N. R. 356; 8 L. T. R., N. S. 166.
(*r*) *Suffield* v. *Brown*, 2 N. R. 378.
(*s*) *Barlow* v. *Rhodes*, 1 Cr. & M. 448; *Wardle* v. *Brocklehurst*, ante, p. 67.

in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee" (*t*). If, therefore, the occupiers of farm A have a right of way, not being a way of necessity over farm B, and both farms come into the hands of one and the same owner, and afterwards the two farms are again severed and granted to two different grantees, the extinct right of way will not be revived and re-created unless the grantor uses language to show that he intended to create the easement *de novo* (*u*).

But there is a distinction between what are termed discontinuous easements, such as rights of way, and continuous easements, such as drains and watercourses: for if the owner of a mill, who has a right of passage for water to his mill through the land of the adjoining landowner, purchases such adjoining land, and becomes the owner both of the mill and of the land over which his watercourse extends, and afterwards aliens the mill, the watercourse and incorporeal right to the free passage of the water to the mill are not extinguished, but pass with the mill as appendant and appurtenant thereto. So if a man hath a dye-house, and there is water running thereto, and afterwards he purchaseth the land upon which the stream runs, and subsequently resells such land, his original right to the watercourse remains (*x*). But if a man hath a stream of water which runneth in a leaden pipe through the adjoining land, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is thenceforth extinct, because he thereby declares his intention that the watercourse and the land shall no longer be enjoyed together (*y*).

Where a way has been extinguished by the unity of seizin of two estates, by the partition of the two the way is revived. Thus it has been laid down as law, "that a way extinguished by unity of possession is revivable afterwards upon a descent to two daughters, where the land through which the way passed is allotted to one, and the other land, to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used is sufficient to revive it" (*z*).

In the Roman law, when the servitude was a non-apparent servitude, it was merged and extinguished by unity of ownership of the dominant and servient tenements; but when it was an apparent continuing servitude, such as a window enjoying light and air, or lands having drains or watercourses, or manifest ways running through them, the servitude was

(*t*) *Plant* v. *James*, 5 B. & Ad. 794. *James* v. *Plant*, 4 Ad. & E. 764. *Bradshaw* v. *Eyre*, Cro. Eliz. 570. *Wardle* v. *Brocklehurst*, ante, p. 67. *Baird* v. *Fortune*, 4 Macq. 127; 5 L. T. R., N. S. 2.

(*u*) *Worthington* v. *Gimson*, 29 Law J., Q. B. 117. *Daniel* v. *Anderson*, 31 Law J., Ch. 610. *Pearson* v. *Spencer*, 1 B. & S. 571. *Pheysey* v. *Vicary*; *Dodd* v. *Burchall*, ante, p. 67.

(*x*) *Sury* v. *Pigot*, Poph. 172; Palm. 444.

(*y*) Popham, C. J., *Lady Brown's* case, cited Palm. 446.

(*z*) 1 Jenk. Cent. Ca. 37. Bro. Abr. EXTINGUISHMENT, 15.

not extinguished: so that if the tenements were subsequently severed, they would be respectively benefited and burthened with their ancient, manifest, and continuing privileges and obligations (*a*).

By the French law, "servitudes cease when things are in such a state that it is impossible any longer to make use of them." They revive, if things are re-established in such a manner that they can be made use of, unless a sufficient space of time has already elapsed to raise a presumption that the servitude has been extinguished. Every servitude is extinguished when the estate to which it is due, and that which owes it, are united in the same hands. Servitude is extinguished also by non-usage during thirty years (*b*).

Effect of the destruction or alteration of the dominant tenement.— When mills or houses which have watercourses, or estovers, or other things appendant or appurtenant to them, be overthrown by the wind, or burned by fire, or fall by any other act of God, if the owner rebuilds them in the same manner as they stood before, they shall have the same ancient rights appendant and appurtenant to the new structure. And although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the durable materials remain, he may rebuild it without the loss of any appendant or appurtenant to it; but it ought to be reconstructed upon the old foundations of the ancient house (*c*).

Of the maintenance and repair of ways and watercourses.— Every grantee of a right of way or watercourse, to be exercised and enjoyed over or through the land of the grantor, must himself repair the way, if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement. "If I grant a way over my land I shall not be bound to repair it. If I stop it, an action lies against me for the misfeasance, but for the bare nonfeasance, viz. in not repairing it; when it is out of repair, no action at all lies (*d*). So if I grant a right to a watercourse through my land, the grantee is bound to keep the watercourse in proper order and repair; and if it becomes ruinous and obstructed, so that the water floods my lands, the grantee will be responsible for the nuisance" (*e*). Where a landowner is under an obligation to repair a road *ratione tenuræ*, an action is not maintainable against him by a person who has sustained damage by reason of the road being out of repair; but an action has been held maintainable by a lord of a manor, who relied on a prescription that he

(*a*) Dig. lib. 8, tit. 2, 3.
(*b*) Cod. Civ. art. 703–706.
(*c*) 4 Co. 86, b, 88, a.
(*d*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322; ante, pp. 61, 68.
(*e*) *Ld. Egremont* v. *Pulman*, M. & M. 404; cited 1 Q. B. 775. *M'Swiney* v. *Haynes*, 4 Ir. Eq. R. 322, post, ch. 4; ante, p. 61. So in the civil law: "In omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adserit, non ad eum cujus res servit." Gale on Easements, 3d ed. p. 425.

and all who had his estate had a right to have a bridge kept in repair by the owner of a mill (*f*). In executing the repairs, the party entitled to the right of way is not justified in doing anything to increase the burthen upon the servient tenement, or to enlarge or alter the nature of the easement. He must use the way as it has always previously been used. If it was a soft way over a ploughed field he has no right to lay down gravel, and if it was a gravelled path he has no right to lay down stones and make a hard macadamised road, without the consent of the owner of the servient tenement.

SECTION II.

REMEDY FOR THE INFRINGEMENT OF INCORPOREAL RIGHTS.

Abatement of obstructions to the enjoyment of easements and profits à prendre.—An obstruction to the enjoyment of a right of common, or of a private right of way, may be abated as a nuisance (*g*).

Of the right to distrain beasts wrongfully put upon a common.—Where there is a colour of right to put beasts upon a common, one commoner cannot distrain the cattle of another. If there is no colour of right he may, and therefore he may distrain the beasts of a stranger. In the case of levancy and couchancy, one commoner cannot distrain another's cattle for a surcharge, but must try by a jury the number accommodated to the land. And where any admeasurement lies between commoners to ascertain what quantity of land the commoner has, one cannot distrain the cattle of the other (*h*). But this general rule may be superseded, and a right to distrain given by an agreement between commoners to restrain the exercise of their privilege to certain specified portions of the common field (*i*).

Of actions for the infringement of incorporeal rights.—An injury to a right imports a damage, though it does not cost the party one farthing (*k*). "Whenever," observes Parke, B., "an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it" (*l*). "It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (*m*).

(*f*) 11 Hen. 4, c. 28, p. 83. *Young* v. *Davis*, 31 Law J., Exch. 254; 7 H. & N. 760.
(*g*) Post, ch. 4, s. 2.
(*h*) *Hall* v. *Harding*, 1 W. Bl. 674.
(*i*) *Whiteman* v. *King*, 2 H. Bl. 4.
(*k*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 955. *Bower* v. *Hill*, 1 Sc. 526.
(*l*) *Nicklin* v. *Williams*, 10 Exch. 227.
(*m*) Holt, C. J., 2 Ld. Raym. 953.

Actions for taking manure from commons.—A commoner may maintain an action for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage may be inappreciable, for the repetition of a tortious act of this kind might eventually be made the foundation of a right, to the serious injury of the other commoners. The action may be brought by the lord, or any one of the commoners, and all the commoners may maintain separate actions for the wrong (*n*).

Actions for surcharging of commons.—If one commoner puts more cattle on the common than he is entitled to do, he is liable to be sued by all or any one of the other commoners who have a right to depasture beasts upon the same common ; and it is no answer to the action that the plaintiff has himself surcharged the common, or that the damage is insignificant, for the wrong-doer might, by repeated torts of this sort, eventually enlarge his right. But if the beasts have been put upon the common by the lord of the manor, or with his license and permission, the commoner cannot maintain an action, unless he has sustained actual damage, and can show that there was not a sufficiency of pasture for his beasts (*o*). Any act that totally destroys the herbage, as feeding innumerable rabbits on a common, will support an action against the lord (*p*).

Actions for obstructions to the enjoyment of a private right of way.—Every person who sustains injury from an unknown and dangerous obstruction to the enjoyment of a private right of way is entitled to an action for damages, whether the unexpected and dangerous obstruction be caused by the owner of the land over which the way exists or by a stranger, and whether the way be claimed by prescription or grant, or be enjoyed only under a parol license or permission, which has not been revoked ; for if a landowner gives his neighbour permission to use a beaten track or path across the land of such landowner, and the latter places a dangerous obstruction in the path, which causes injury to the licensee, he will be responsible in damages to the latter, if he has failed to give him timely notice and warning of the obstruction (*q*). A continuing obstruction to the exercise and enjoyment of an incorporeal right is a continuing nuisance ; so that if an action has been brought, and damages recovered for the injury, and the nuisance is not then abated, the continuance of the obstruction constitutes a fresh injury, for which another action may be brought, and so *toties quoties*, until the obstruction is removed (*r*).

Of the parties to be made plaintiffs—Tenant and reversioner.—The action

(*n*) *Pindar* v. *Wadsworth*, 2 East, 159.
(*o*) *Hobson* v. *Todd*, 4 T. R. 73. *Smith* v. *Feverell*, 2 Mod. 7. *Greenhow* v. *Ilsley*, Willes, 619.
(*p*) *Wells* v. *Watling*, 2 W. Bl. 1233.
(*q*) *Corby* v. *Hill*, 4 C. B., N. S. 556; 27 Law J., C. P. 318.
(*r*) *Shadwell* v. *Hutchinson*, 4 C. & P. 333 ; post, ch. 4.

for an injury to real property resulting from obstructions to the enjoyment of profits à prendre, or easements appurtenant to messuages or tenements, may be brought by the occupier in respect of the immediate injury to his possessory interest, and by the reversioner in respect of the deterioration in the marketable value of the property, when the damage done is of a permanent character.

An obstruction to the exercise of a private right of way appurtenant to lands or tenements which, if allowed to continue unopposed, would be evidence against the enjoyment of the right, is, of course, an injury to the reversioner, in respect of which an action for damages is maintainable (*s*). "The erection of a wall," observes Maule, J., "across a way—assuming, of course, that there was no contract as between the tenant and the defendant—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land; and there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall" (*t*). But a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way, such an act during the existence of the tenancy not being necessarily injurious to the reversion. Neither can he maintain an action in respect of an obstruction of a public way leading to his property, unless he can show, either that the obstruction is of a permanent character, or that it would afford evidence against the existence of the right, if it was allowed to continue unopposed. For the public injury the landlord has a remedy, as one of the public, by indictment, and he is not himself personally damnified merely by his tenant's being temporarily prevented from enjoying his house in so ample a manner as he might otherwise have done. But if the obstruction appears to be of a permanent character, or professes, either by notice affixed, or in any other way, to deny the public right, and so lead to an opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which an action might be maintained by the reversioner (*u*).

An action is also maintainable by the reversioner of a mill demised to a tenant, for diversion by a stranger of water from the mill-head; for if the diversion was allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert the water, to the serious injury of the inheritance. Where permanent damage has been done to

(*s*) *Battishill* v. *Reed*, 18 C. B. 696.
(*t*) *Kidgill* v. *Moor*, 9 C. B. 378.
(*u*) *Dobson* v. *Blackmore*, 9 Q. B. 1004; 16 Law J., Q. B. 233. *Hopwood* v. *Schofield*, 2 Mood. & Rob. 34. *Kidgill* v. *Moor*, 9 C. B. 379.

property let on lease by the erection of a wall or hoarding obstructing ancient lights, and lessening the value of the property in the market, there is an injury to the reversion, in respect of which the reversioner is entitled to maintain an action (*x*), as well as an injury to the possession, in respect of which the occupier may sue. A wooden hoarding of an unsubstantial character may cause permanent injury to the property, by the obstruction it offers to the passage of light and air, and may be an injury to the reversioner (*y*).

If the windows of a house occupied by the servant of the owner have been unlawfully darkened or obstructed, the owner may sue for the immediate injury as the occupier of the house, the occupation of the servant being the occupation of the master (*z*): but if the house is in the possession of a lessee paying rent, the action should be brought in respect of the injury to the reversion; and if there is a lease in writing, it must be produced (*a*).

Parties to be made defendants.—If a man erects on his own land an obstruction to the access of light and air to his neighbour's ancient windows, and then demises the land with the obstruction upon it, an action will lie both against him and his tenant for the continuance of the obstruction (*b*). A clerk who has superintended the erection of a building by which ancient lights were darkened, and who alone directed the workmen, may be joined as a co-defendant with the contractor who appointed him to superintend the progress of the building (*c*).

The actual occupier of lands burthened with the servitude of keeping up a boundary-fence for the benefit of the adjoining occupier or landowner is the proper party to be made defendant in an action for neglecting to maintain and repair the fence, for it is the duty of the actual occupier, and not of the landlord, to keep up the fences (*d*). If the occupier of a house or land, having control over all workmen upon his premises, suffers such workmen to bring stone and earth therefrom, and place them in a highway adjoining the house, he will be responsible for any damage that may be caused to third parties by the obstruction (*e*); and so also will the workman who actually placed the obstruction in the thoroughfare.

Of the plaintiff's declaration — Venue — Statement of the cause of action.—The venue in declarations for obstructions to the enjoyment of profits à prendre and easements is local, and the cause of action must be laid in the county in which it arose. When the easement is claimed by

(*x*) *Jesser* v. *Gifford*, 4 Burr. 2141; 3 Leon. 209. *Shadwell* v. *Hutchinson*, 1 M. & M. 350.

(*y*) *Metrop. Ass.* v. *Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 332.

(*z*) *Bertie* v. *Beaumont*, 16 East, 33.

(*a*) *Cotterill* v. *Hobby*, 4 B. & C. 465.

(*b*) *Roswell* v. *Prior*, 2 Salk. 460; 12 Mod. 636.

(*c*) *Wilson* v. *Peto*, 6 Moore, 47. And see post, ch. 20.

(*d*) *Cheetham* v. *Hampton*, 4 T. R. 318; Buller, J. *Rider* v. *Smith*, 3 T. R. 768. *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*e*) *Burgess* v. *Gray*, 1 C. B. 591; post, ch. 4, s. 2.

grant, it is not necessary to mention or refer to the deed of grant in the declaration. It is enough for the plaintiff to allege that he is entitled to it by reason of his possession of a particular messuage or land (*f*). But the plaintiff's right to the enjoyment of the easement should in all cases be asserted on the face of the declaration (*g*). In all actions for disturbance of an easement or privilege, the obstruction ought to be charged on the pleadings in the thing itself in which the party has a right. Thus, if the declaration complains that the plaintiff's right of common was obstructed by the locking of a gate, or his right to take water from a cistern by the blocking up of a way or passage leading to the cistern, the declaration should assert and set forth the plaintiff's right of common, or right of taking water from the cistern, by reason of his possession of a messuage, tenement, or land, and allege that the plaintiff had a right to go through the door with his cattle to enjoy his right of common, or along the way or passage in order to take water from the cistern (*h*).

The plaintiff must show how his right arises; but it is sufficient for the plaintiff to declare on his possession of a right of way, or a right of common, or other profit or easement, by describing it, and claiming it by reason of his possession of the land. His possession is enough; and it is unnecessary in an action for injury to it to show whether it arises from grant or prescription. So, in the case of an injury to a market or a ferry. In the case of an injury to the plaintiff's mill, where the plaintiff has a right to have the grain of others ground there by tenure, prescription, or custom, it is enough to allege the plaintiff's possession and the defendant's obligation to grind; which is, indeed, part of the plaintiff's right in a general form, as by reason of the possession of a house, or that all the inhabitants ought to grind there, and that the defendant is an inhabitant; which is a description of the right by tenure in the one case, and by custom in another.

"There is another class of cases, in which an obligation is cast on the defendant to repair a way to a close of the plaintiff over the defendant's land, to repair fences against the plaintiff's land, or to repair a wall adjoining the plaintiff's house. In these cases, it is enough to state in a general way the defendant's obligation by reason of his possession of his land, or wall, or an equivalent averment. One reason given is, that in such cases a charge is laid upon the right of another, which, it may be, the plaintiff cannot particularly know" (*i*). In a declaration by a plaintiff for an injury sustained by him from an obstruction placed in a private way, which the plaintiff was authorized to use by the parol permission

(*f*) *Northam* v. *Hurley*, 22 Law J., Q. B. 185; 1 Ell. & Bl. 665.

(*g*) *Whaley* v. *Laing*, 2 H. & N. 476; 27 Law J., Exch. 422. *Laing* v. *Whaley*, 28 ib. 685.

(*h*) *Tebbutt* v. *Selby*, 6 Ad. & E. 786; 1 N. & P. 710.

(*i*) Parke, B., *Metcalfe* v. *Hetherington*, 11 Exch. 271; 24 Law J., Exch. 319.

of the owner of the soil, it is enough for the plaintiff to describe the road, and assert that he had, by the permission of the owner and occupier of the soil, a right to use the road, and that the defendant wrongfully placed an obstruction in the road, *per quod* the plaintiff was injured (*k*).

Where a declaration by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and that the defendant wrongfully chained and fastened a certain gate standing in and across the way, and wrongfully kept the same fastened, and so obstructed the way, whereby the plaintiff was injured in his reversionary estate, it was held that the declaration set forth a sufficient cause of action, and that the plaintiff's reversionary interest might be injured by the acts complained of (*l*).

If the declaration is for the obstruction of a flow of water through a drain, it should set forth the right of the plaintiff to the flow of water through the drain, and that the defendant wrongfully obstructed it, stating the nature of the obstruction, and showing that the lands of the plaintiff became flooded and greatly injured, and his crops damaged and destroyed, and that he was put to expense in draining off the water and restoring his land to a state of good cultivation, claiming damages (*m*).

A declaration setting forth the plaintiff's possession of a house, and alleging that the defendant wrongfully excavated beneath, or contiguous to, the foundations of the house, without leaving proper support for the said foundations, and thereby caused the house to fall; or that he wrongfully pulled down and destroyed the foundations of the house; or that he dug beneath the house, and undermined it, so that the walls cracked, and the plaintiff was obliged to remove with his family, and hire another house, discloses a good cause of action (*n*). If it appears on the face of the declaration that the alleged wrongful act was done on the adjoining land, the declaration is not now demurrable, because it does not show any right to support from the adjoining land, unless it appears upon the face of the declaration that the alleged wrongful act was done by the defendant himself, on his own land. If the defendant does not appear upon the face of the declaration to be the owner of the adjoining land, he is, *primâ facie*, a wrongdoer; for, if a house is *de facto* supported by the soil of a neighbour, this is a sufficient title to the support against any one but that neighbour, or one claiming under him. A man who should prop his house up by a shore, resting on his neighbour's ground, would have a right of action against a stranger who, by removing it, should cause the house to fall,

(*k*) *Corby* v. *Hill*, 4 C. B., N. S. 556; 27 Law J., C. P. 318. And see further, ante, pp. 55, 120. *Holford* v. *Hankinson*, 5 Q. B. 584.

(*l*) *Kidgill* v. *Moor*, 9 C. B. 378.

(*m*) *Hewlins* v. *Shippam*, 5 B. & C. 221.

(*n*) *Rogers* v. *Taylor*, 2 H. & N. 829; 27 Law J., Exch. 175. *Bonomi* v. *Backhouse*, ante, p. 43, 9 H. L. C. 503.

though he could have no action against his neighbour if the latter took it away and caused the same damage (*o*).

If the damaged buildings are in the possession of tenants to whom they have been demised, and the plaintiff claims compensation for damage done to his reversion, the declaration should set forth that the buildings are in the occupation of certain tenants of the plaintiff, that the reversion of the buildings is vested in the plaintiff, and that the plaintiff, by reason of his reversionary interest in them, is of right entitled to have the buildings supported laterally by the adjoining land of the defendant, and showing that, by the wrongful withdrawal of the necessary support, the buildings became uninhabitable, and the plaintiff was injured in his reversionary estate (*p*).

Declarations for an obstruction to the plaintiff's lights or privileged windows should set forth the plaintiff's possession of a dwelling-house, describing it by name and situation, and of certain windows belonging to the dwelling-house, and that the plaintiff had a right to the free passage for light across the defendant's land to the windows, and that the defendant wrongfully erected a wall or building so near to the windows that the light was prevented from passing to the windows, whereby they became darkened. When the declaration is for an injury to the plaintiff's reversionary estate, it should allege that the plaintiff was entitled to the reversion of the dwelling-house, and that, by means of the obstruction to the free passage of light caused by the defendant, the plaintiff was injured in his reversionary estate (*q*).

What may be given in evidence under the plea of not guilty — Not guilty by statute.—In actions for obstructions to the enjoyment of easements and profits à prendre, the plea of not guilty operates as a denial only of the obstruction, and not of the plaintiff's right; and no other defence than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration. If the facts stated in the inducement are not intended to be admitted, they must be expressly traversed and denied (*r*). When, however, the act complained of has been done in the exercise of some statutory authority, enabling the defendant to give the special circumstances of justification in evidence under the plea of not guilty, the plaintiff's right to do the act, in the exercise of the powers conferred upon him by statute, may be given in evidence under the plea of not guilty, provided he has inserted "by statute" in the margin of his plea (*s*).

(*o*) *Jeffries* v. *Williams*, 5 Exch. 800; 20 Law J., Exch. 14. *Bibbey* v. *Carter*, 7 W. R. Exch. 193.

(*p*) *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 622; 28 Law J., Q. B. 378. *Backhouse* v. *Bonomi*, 9 H. L. C. 503. *Bibby* v. *Carter*, 4 H. & N. 153; 28 Law J., Exch. 182.

(*q*) *Metrop. Ass.* v. *Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 330.

(*r*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl., App. lxxxi.

(*s*) Ante, p. 56; and post, ch. 21.

Traverse of the right.—If the defendant denies the existence of the right claimed by the plaintiff, he must, as we have seen, traverse it in the very words in which it is asserted in the declaration (ante, p. 57). Under traverse of the right, the defendant may show that the right was granted by a mere parol license or agreement, not under seal, and that the defendant, finding the exercise and enjoyment of the right troublesome and inconvenient, had revoked the license, or refused to perform the agreement, and had prevented any further exercise and enjoyment of the privilege (*t*).

Plea of leave and license.—Under a plea of leave and license it may be shown that the plaintiff, having an easement of light and air to his ancient windows across the defendant's area, gave the defendant a parol license or permission to put a skylight over his area, and that the license had been acted upon and executed by the defendant, and the skylight built, and that the building of the skylight caused the injury of which the plaintiff complains (*u*).

Evidence at the trial will, of course, depend upon the pleas upon the record. Under the plea of not guilty, the plaintiff must prove that the injurious act was done by the defendant, or by his procurement (*x*). If the existence of the incorporeal right is denied by the pleadings, the plaintiff must establish his title by proof of a grant, express or implied (ante, p. 66), or of uninterrupted user and enjoyment as of right (ante, pp. 92–108), for the full period required by the Prescription Act. If all the acts of user and enjoyment have taken place during the occupation of the land by tenants, their submitting to them will not, as we have seen, bind the owner of the land, without proof of his being also aware of them; but, if the acts of user have been open and notorious, and have gone on for a great length of time, a jury may presume therefrom that the owner knew of them (*y*).

All circumstances tending to show that no grant could have ever existed, or have lawfully been made, are, as we have seen, admissible in evidence, to show that there was no enjoyment as of right within the meaning of the statute (ante, pp. 93, 97). When the plaintiff rests his claim to an easement upon the defendant's land, upon a prescriptive title from twenty years' enjoyment as of right, and without interruption for the period of twenty years, the claim may be answered by proof of a license, written or parol, for a limited period, falling short of the twenty years relied upon; for every time that leave is asked for and obtained there is, as we have seen, a break in the continuance of the enjoyment (ante, pp. 106, 107).

If the plaintiff proves a larger and more extended right than he claims

(*t*) *Hewlins* v. *Shippam*, 5 B. & C. 221. *Cocker* v. *Cowper*, 1 C. M. & R. 418. *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*u*) *Winter* v. *Brockwell*, ante, p. 110.

(*x*) Ante, p. 56; post, ch. 20, s. 1.

(*y*) *Davies* v. *Stephens*, 7 C. & P. 570; ante, p. 93.

in his declaration, the proof is not objectionable on the ground of variance, provided the right claimed is included in the more extended right proved, and is not inconsistent with it (*z*).

Proof of right of way.—Proof that the plaintiff has used a way for various purposes, whenever he required it, for twenty years, is *primâ facie* evidence of a right of way for all purposes, from which a jury may infer a general right; but proof of user for one purpose, or for particular purposes, will not raise an inference of a general right (*a*). Proof of the exercise of a right of way for twelve years for all purposes, and for twenty years for the only purposes for which the defendant required it, is sufficient to establish the existence of a general right (*b*). When the right depends upon express grant, the nature and extent of the right are defined by the express terms of the grant. When it rests upon user and enjoyment, the extent of the right is defined and limited by the extent of the user and enjoyment; and it is then, in general, a question for the jury in each particular case as to whether the evidence of user shows a general right of way, both for horses and carriages, and for all reasonable and necessary purposes, or only a restricted and limited right for a particular purpose (*c*). If the plaintiff has a right to go backwards and forwards with carts and carriages, and it is reasonable that he should have room to turn round, he will have a right to go on the adjoining land, if the road is not wide enough for the purpose; but what is a reasonable exercise of a right of way is a question for a jury (*d*).

Proof of a right to the free access of light.—The right to the free access of light across the adjoining land of a neighbouring proprietor may be established, as we have seen (ante, p. 103), by proof of uninterrupted user and enjoyment for twenty years. But a right to the free access of light from uninterrupted user and enjoyment does not extend to open spaces of ground and yards. Thus, where a saw-pit and timber-yard had been placed close to the edge of the adjoining property, it was held that the pit and yard might be darkened at any time, and the access of light thereto impeded, by the erection of buildings by the adjoining landowner.

A right to the free passage of air over vacant land to a mill cannot, as we have seen, be acquired by mere enjoyment, however long continued, as the owner of the land has no means of interrupting the free current of air, and the law raises no presumption of a grant from enjoyment had under such circumstances (*e*).

(*z*) *Duncan* v. *Louch*, 6 Q. B. 914.

(*a*) *Cowling* v. *Higginson*, 4 M. & W. 255.

(*b*) *Dare* v. *Heathcote*, 25 Law J., Exch. 245.

(*c*) *Ballard* v. *Dyson*, 1 Taunt. 287. *Bower* v. *Hill*, 2 Sc. 535. *Brunton* v. *Hall*, 1 G. & D. 207.

(*d*) *Hawkins* v. *Carbines*, 27 Law J., Exch. 44.

(*e*) *Webb* v. *Bird*, ante, p. 96, overruling *Roberts* v. *Macord*, 1 Mood. & Rob. 230. Winch, J., Vin. Abr. NUISANCE, G. 19. *Goodman* v. *Gore*, 2 Rolle, Abr. 704, pl. 23. *Trahern's* case, Godb. 233.

Proof of obstruction to a right of way — Erection of gates.— If a gate is erected across a private footway by the owner of the soil, so as to afford no actual obstruction to the use of the way by the grantee, an action would not be maintainable against the landowner so erecting the gate; but in the case of the grant of a way for horses and carriages, and the use of the way by the grantee free from gates, a gate could not afterwards be lawfully placed across the way (*f*).

Proof of obstructions to the access of light.— To establish a cause of action for an obstruction to the access of light to the plaintiff's ancient windows, the plaintiff must prove a substantial privation of light, sufficient to render the occupation of his house comparatively uncomfortable, or to prevent him from carrying on his business as beneficially and profitably as he had formerly done. The mere diminution of a ray or two of light will not suffice for the maintenance of an action (*g*). When the action is brought by a reversioner in respect of an injury to his reversionary estate, it must be shown that the obstruction is of such a nature as to cause a permanent injury to the property (*h*).

Proof of the right to an ancient weir and fishery in a navigable river.— The right to have a weir in the channel of a navigable river for the purpose of catching fish is, as we have seen, a right founded on grant or prescription; and the right to ancient weirs has in some instances been legalised by statute, although they totally obstruct the navigation of the river (*i*).

Proof of the servitude of maintaining and repairing fences.— The mere fact of an owner or occupier having repaired a fence does not, as we have seen, afford any ground for presuming that his land was burthened with the servitude of keeping up the fence for the benefit of his neighbour; because it is for his own benefit to keep up a fence for the purpose of preventing his own cattle from straying from his land, and committing trespasses upon the adjoining land. If it be proved that the defendant had been threatened with legal proceedings if he did not repair the fences, or that, if he did not repair, and the plaintiff became damnified in consequence of his cattle trespassing upon the lands of other persons, the plaintiff would look to him for compensation, and that the defendant *then* repaired, this would be some evidence of the defendant's being under a legal obligation to maintain and repair the fence.

An allegation in a declaration that the defendant, by reason of his possession of a particular close, was bound to repair a fence dividing such

(*f*) *James* v. *Hayward*, W. Jones, 221. Cro. Car. 184.

(*g*) *Back* v. *Stacey*, 2 C. & P. 466. *Parker* v. *Smith*, 5 ib. 438. *Pringle* v. *Wernham*, 7 C. & P. 378. *Wells* v. *Ody*, ib. 410.

(*h*) *Metrop. Ass.* v. *Petch*, 5 C. B., N. S. 504; ante, p. 121.

(*i*) *Williams* v. *Wilcox*, 8 Ad. & E. 336.

close from the adjoining land, is proved by the production of a deed whereby the defendant has undertaken the performance of that duty (*k*).

Inadmissibility in evidence of statements and declarations by a tenant in derogation of the title of his landlord.—"You cannot," observes Lord Campbell, "admit in evidence the declarations of a tenant which derogate from the title of the reversioner. It would be very mischievous if it were in the power of a tenant to destroy a profit à prendre belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, or to a profit à prendre, turbary, or other common, and create evidence of servitude against the reversioner. The acquiescence of a tenant cannot prejudice his landlord (*l*), and, *à fortiori*, his declarations cannot" (*m*).

Of the damages recoverable in actions for the infringement of incorporeal rights (*n*).—Wherever the exercise or enjoyment of an incorporeal right has been obstructed, damages are, as we have seen, recoverable, though no actual or specific damage in point of fact can be proved; for every unresisted obstruction to the enjoyment of the right would be evidence against the existence of the right, and therefore highly injurious to the party claiming it. Therefore an action may be maintained by a commoner for an injury done to his common, without proving actual damage. And whenever there has been an obstruction to the exercise of a right of way, which, if acquiesced in for twenty years, would be evidence against the existence of the right, there is an injury, in respect of which damages are recoverable, although there is no proof of actual pecuniary damage (*o*).

Where the occupier of a field, who had a right to have a fence separating his field from the adjoining land repaired at the expense of the adjoining occupier, took in the horse of a neighbour for the night, and the horse got through the boundary-fence into the servient tenement, and fell into a ditch and was killed, it was held that the occupier of the dominant tenement was entitled to recover the full value of the horse (*p*). And where the plaintiff brought an action against the defendant for the non-repair of the fences of the latter, whereby the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay-stack, it was held that the damage was not too remote, and that there is no distinction between the smothering of cattle by the accidental

(*k*) *Boyle* v. *Tumlyn*, 6 B. & C. 338.
(*l*) *Daniel* v. *North*, 11 East, 372.
(*m*) *Papendick* v. *Bridgwater*, 5 Ell. & Bl. 177.
(*n*) As to damages in general, see post, ch. 22, s. 1.
(*o*) *Bower* v. *Hill*, 1 Sc. 533; 1 Bing. N. C. 549; ante, pp. 7, 8; post, ch. 22.
(*p*) *Rooth* v. *Wilson*, 1 B. & Ald. 59; ante, p. 102.

falling of a hay-stack, and their being drowned by tumbling into a ditch (*q*).

In all cases of nuisance from obstructions to the free access of light and air to ancient windows (post, ch. 4), damages are recoverable by the reversioner, because the injury is an injury to a right; and if the reversioner were to be prevented from bringing his action during the existence of the lease, the testimony of the witnesses who could speak to the windows being ancient windows might be lost (*r*).

When an action is brought by a reversioner for an injury to his reversionary interest, from a temporary obstruction of a right of way theretofore used by the tenants and occupiers of his land, nominal damages only are, in general, recovered in the first instance, as the defendant is liable to another action every day that he continues the obstruction; and it is to be presumed that he will immediately remove it: but if he persists in continuing the obstruction, and a second action is brought for the continuance of the nuisance, exemplary damages will be given, in order to compel him to abate it (*s*).

Injunction to prevent the disturbance of easements granted by parol.—If one landowner verbally agrees to allow an adjoining proprietor a right of way, or a right to the passage of water through his land, and the enjoyment of the privilege involves the outlay of money, and the consenting landowner allows the licensee or party to whom the privilege has been granted to expend money in making a road or laying down a railway, or constructing a watercourse, or erecting buildings; the Court of Chancery will interfere by injunction to prevent such consenting landowner from disturbing the enjoyment of the way or watercourse, or easement, so verbally granted (*t*). And where works involving expense are made on land belonging to an incorporated company, on a spot where the company may be considered personally present, where their premises are situated and their operations carried on, the company, though an incorporated body, must be considered, for all purposes of knowledge and acquiescence, to be in the same position as a private individual, and will be bound in the same way (*u*). In cases of this sort, where a party has obtained an equitable right to the enjoyment of an easement or privilege by reason of the expenditure of his money on the faith of a verbal promise or understanding, but has no legal title to any incorporeal right over the land of

(*q*) *Powell* v. *Salisbury*, 2 Y. & J. 391.

(*r*) Ld. Tenterden, C. J., *Shadwell* v. *Hutchinson*, 1 M. & M. 352. *Jesser* v. *Gifford*, 4 Burr. 705, 2143.

(*s*) *Hopwood* v. *Schofield*, 2 Mood. & Rob. 35. *Battishill* v. *Read*, 18 C. B. 715; 25 Law J., C. P. 200; post, ch. 4, s. 2.

(*t*) 2 Eq. Cas. Abr. 522, pl. 3. *Jackson* v. *Cator*, 5 Ves. 689. *Powell* v. *Thomas*, 6 Hare, 300. *Mold* v. *Wheatcroft*, 27 Beav. 510. *Duke of Devonshire* v. *Elgin*, 20 Law J., Ch. 495. *East Ind. Co.* v. *Vincent*, 2 Atk. 82. *Davies* v. *Marshall*, 7 Jur. N. S. 1247; 4 Law T. R. N. S. 581.

(*u*) *Laird* v. *Birkenhead Rail. Co.* 1 Johns. 500; 29 Law J., Ch. 218.

another, his equitable claim may, in general, be got rid of by tendering him the amount of his expenditure before the privilege is withdrawn or the enjoyment of it has been interrupted.

If a tramway is made across land with the consent of the owner of the fee, and is used for a number of years on payment of rent, the Court of Chancery will interfere to prevent an arbitrary increase of the rent, and prevent the licensee from being deprived of the use of the tramway on proper compensation being paid to the owner of the soil for the enjoyment of the way (*x*).

If the owner in fee of land stands by and allows another person to erect a building upon his land, and afterwards agrees with him as to the rent to be paid for it, neither he nor any person claiming under him can deprive the person who has so laid out his money of the use of the building (*y*). And if an adjoining landowner assents to the rebuilding of a house upon a certain plan, with an increased elevation, or with an enlargement of ancient windows, or the opening of new windows, and the house is accordingly rebuilt on the approved plan, the approver cannot afterwards object to the alterations (*z*).

Where an easement has been bargained for and sold by parol, and been enjoyed for years by the purchaser thereof, the court will restrain the vendor and any persons claiming under him (not being a purchaser of the land for value without notice), from disturbing or interrupting the enjoyment of the privilege. Thus, where A sold to his neighbour B the right of using two chimneys in A's wall for a certain consideration, which was paid, and the chimneys used for several years, and C purchased A's house without notice of the right, but there being fourteen chimney-pots on the wall, and only twelve flues in A's house, purchased by C, the court held that C was put on inquiry, that he had constructive notice of the right, and an injunction was granted to restrain him from stopping up the two chimneys leading to the two extra chimney-pots (*a*).

Whenever a licensee has enjoyed an easement for several years, the court will not allow such enjoyment to be summarily interfered with, and the licensee put to great immediate inconvenience, but will by injunction prevent the disturbance of the privilege and put the question in dispute between the parties in a proper course of investigation (*b*).

Injunction to prevent obstructions to the free access of light to windows.—If a building has been commenced which, when carried up and finished, will cause a serious obstruction to the passage of light and air to ancient windows, the owner of the windows may obtain an injunction to restrain

(*x*) *Mold* v. *Wheatcroft*, 27 Beav. 510.
(*y*) *Dann* v. *Spurrier*, 7 Ves. 236.
(*z*) *Cotching* v. *Basset*, 32 Law J., Ch. 286.
(*a*) *Hervey* v. *Smith*, 22 Beav. 299; 1 K. & J. 392.
(*b*) *Hervey* v. *Smith*, ut sup.

the erection of the building (*c*). But the court will not, upon an exparte application for an injunction, order a building which is in course of erection to be pulled down, as that might do irreparable injury to the party erecting it, if on the final hearing of the matter it should be found that the right was with him. The proper order will be for the building not to be further proceeded with, until the rights of the parties have been decided by the proper tribunal (*d*).

If ancient windows looking over or upon the land of another have been enlarged, and then totally obstructed by the adjoining landowner, a court of equity will, on the windows being restored to their ancient dimensions, grant an injunction to restrain such adjoining landowner from continuing the obstruction to the restored windows (*e*). And if a party possessed of an ancient diamond-paned, or stone-mullioned, or Gothic windows, or a window painted on the inside, puts in a modern sash with plate glass, or rubs off the paint and so increases the volume of light inside his house, and his neighbour blocks up the window, or builds immediately before it, the court will by injunction compel him to remove the obstruction, on the ground that there has been no enlargement of the external aperture (*f*).

A party does not lose his right to an injunction merely because he has himself erected buildings which deprive him of a certain amount of light and air (*g*).

Injunction to prevent the working of mines and quarries so as to deprive the adjoining land of its necessary support.—If tenant in fee-simple grants a portion of his land for building purposes, he impliedly grants, as we have seen, an easement of lateral support for the buildings from his adjoining land; and if he, or those who claim under him, attempt to derogate from the grant by excavating so as to endanger the buildings, the court will grant an injunction to prevent the threatened mischief. And where a landowner has sold his land to a railway company under the compulsory powers of an act of parliament, the court will interfere by injunction to prevent him from working mines in his adjoining land, so as to endanger the stability of the railway, unless the legislature has given the company the power of purchasing such adjoining land, and has provided that they shall protect themselves by purchasing so much of it as may be required to give their railway and works the requisite amount of lateral support (*h*).

(*c*) *Arcedeckne* v. *Kelk*, 5 Jur. N. S. 114; 32 Law T. R. 331. *Back* v. *Stacy*, 2 Russ. 121. *Sutton* v. *Ld. Montfort*, 4 Sim. 559.

(*d*) *Ryder* v. *Bentham*, 1 Ves. sen. 543. *Wynstanley* v. *Lee*, 2 Swanst. 333.

(*e*) *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 Law J., Ch. 123. *Weatherby* v. *Ross*, 32 ib. 130. *Jones* v. *Tapling*, 9 Jur. N. S. 462.

(*f*) *Turner* v. *Spooner*, ante, p. 112.

(*g*) *Arcedeckne* v. *Kelk*, 2 Giff. 684.

(*h*) *North-East. Rail. Co.* v. *Elliott*, ante, p. 73.

CHAPTER IV.

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SECTION I.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS.

Of nuisances.—The term nuisance, derived from the French word *nuire*, to do hurt or to annoy, is applied in the English law indis-

criminately to infringements upon the enjoyment of proprietary and personal rights. A man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbour, or by constructing a cornice, or fixing a spout, or any projection which causes, or has a tendency to cause, an unnatural quantity of rain-water to descend on his neighbour's house and land (*i*); also by erecting and working a noisy smith's forge, or noisy workshops (*k*), or a stinking tallow-furnace, smelting-house, dye-house, lime-kiln, tan-pit, privy, or hog-sty (*l*), or making a cesspool, the filth from which percolates through the soil and contaminates the water of his neighbour's well or spring (*m*), or burning lime or bricks, or erecting a glass-house or brew-house so near to a dwelling-house that the smoke and smell thereof enter the house and render it unfit for habitation (*n*), or setting up a lime-pit for cleaning skins, or a dye-house, and letting the drainage therefrom run into a watercourse or pond, and corrupt the water, or destroy or deteriorate the fish and the fishing (*o*), or disturbing a decoy-pond by the firing of guns in the neighbourhood of the pond (*p*), or stopping or diverting water that used to run to another's mill (*q*).

Nuisances from the non-repair of, or from neglecting to cleanse, sewers, drains, and watercourses.—Every occupier is bound to prevent the filth from his drains or cesspools from filtering through the ground into his neighbour's house or land. It is a charge or duty laid on him of common right, for neglect of which he is answerable (*r*). Every grantee also of an artificial drain or watercourse constructed for the passage of water through the land of the grantor, for the use and benefit of the grantee, is bound to maintain and repair the drain and watercourse and keep it in proper order; and if he neglects so to do, and the watercourse becomes obstructed so that the grantee's surplus water floods the land of the grantor, the latter is entitled to compensation in damages for the nuisance (*s*).

The grantee of a right of passage for waste water from his messuage or tenement, through a drain or watercourse in the land of the grantor, is guilty of a nuisance if he allows the foul water and filth from privies or water-closets to enter the drain; and the grantor of the easement or the owner of the land through which the right of watercourse extends may

(*i*) *Penruddock's* case, 5 Co. 205; *Baten's* case, ib. 96. *Reynolds* v. *Clark*, Fort, 212. *Fay* v. *Prentice*, 1 C. B. 828.

(*k*) *Bradley* v. *Gill*, Lutw. 69. *Elliotson* v. *Feetham*, 2 Bing. N. C. 134.

(*l*) *Poynton* v. *Gill*, *Morley* v. *Pragnell*, Cro. Car. 510. *Jones* v. *Powell*, Hutt. 135. *Bliss* v. *Hall*, 4 Bing. N. C. 183.

(*m*) *Norton* v. *Scholefield*, 9 M. & W. 665.

(*n*) *Walter* v. *Selfe*, 4 De Gex & Sm. 321; 20 Law J., Ch. 433. *Jones* v. *Powell*, Palm. 539.

(*o*) *Aldred's* case, 9 Co. 59 a. *Hodgkinson* v. *Ennor*, 8 L. T. R., N. S. 451; 2 N. R., Q. B. 272.

(*p*) *Keble* v. *Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington* v. *Taylor*, 11 East, 571.

(*q*) F. N. B. 184.

(*r*) *Tenant* v. *Golding*, 1 Salk. 21.

(*s*) *Ld. Egremont* v. *Pulman*, M. & M. 404, cited *Bell* v. *Twentyman*, 1 Q. B. 775. *Hoare* v. *Dickenson*, 2 Ld. Raym. 1503. Ante, pp. 118, 119.

stop up the watercourse for the purpose of abating the nuisance (*t*). Every landowner who constructs a sewer on his own land, and uses it for the purpose of draining his own premises, is bound to keep the filth from this sewer from becoming a nuisance to the adjoining occupiers; and if, by reason of an original faulty construction of the sewer, the filth therefrom percolates through the soil and floods the cellars of the adjoining occupiers, the landowner will be responsible for the nuisance, although such occupiers are his own tenants (*u*). But a landlord who builds houses, and constructs a sewer through his own land for the purpose of draining them, and makes drains from each house into the sewer, does not thereby render himself responsible to his own tenants for the repair of the sewer, or for injuries that may be occasioned to them from overflowings of the sewer; for the grantor of a right of watercourse or passage for water through his land is not, as we have seen, bound to keep the watercourse in repair for the benefit of the grantee, unless he has by express contract taken that duty upon himself. It is the grantee of the easement who is bound to keep the drain or watercourse in proper order and prevent it from becoming a nuisance (ante, pp. 118, 119).

Offensive smells and noisome trades.—A man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable: provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring house. But if a nuisance is created, it is no answer to an action for damages to show that the place where the trade is carried on is a fit and convenient place for such a trade and that the exercise of the trade there is only a reasonable use by the defendant of his own land. The spot may be very convenient for the defendant or for the public at large, but very inconvenient to a particular individual, who chances to occupy the adjoining land; and proof of the benefit to the public from the exercise of a particular trade in a particular locality can be no ground for depriving any individual of his right to compensation in respect of the particular injury he has sustained from it (*x*). Where, therefore, it is said that "a tan-house is necessary, for all men wear shoes," yet this may be pulled down if it is erected so as to cause a nuisance to another: so of a glass-house, for they ought to be erected in places convenient for them (*y*): what is meant is, that they must be erected in a place where they will not cause a nuisance to anybody.

(*t*) *Cawkwell* v. *Russell*, 26 Law J., Exch. 35.

(*u*) *Alston* v. *Grant*, 3 Ell. & Bl. 128.

(*x*) *Bamford* v. *Turnley*, 31 Law J., Q. B. 286. *Cavey* v. *Ledbetter*, ib. 290 n. 13 C. B., N. S. 470, overruling *Hole* v. *Barlow*, 4 C. B., N. S. 335. *Heyingbotham* v. *East. & Continent. St. P. Co.* 8 C. B. 337.

(*y*) *Jones* v. *Powell*, Palm. 536.

It is not necessary to prove that the smell is unwholesome. The smell of stied hogs, melting tallow, and other smells, may not be positively noxious, but they may be very noisome and sickening, keeping all who inhale them in a state of chronic discomfort, though they may not injure or destroy health (*z*). Trades are no doubt carried on for the benefit of the public, but the primary object is the benefit of the particular manufacturer who realizes the profit of the business ; and it is no answer to a private individual, who is prejudiced or injured by the exercise of the trade in such a way as to be a nuisance, to say that others are benefited by it (*a*).

Brick-burning.— Brick-burning is not in itself a noxious trade (*b*), for bricks may be burned, by the selection and combination of proper substances for burning, without the emission of smoke or disagreeable smells; but if, by the use of coals or impure ashes and animal substances, smoke, and vapour, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and render the house manifestly less comfortable, the brick-burning will be a nuisance, though the pollution of the air may not be carried to the extent of rendering it noxious to animal or vegetable health. But the inconvenience or discomfort must go to the extent of materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions amongst English people (*c*).

In cases where a man is not carrying on the trade of brickmaking, but is merely digging out the soil from his own land for the building of a house thereon, and when the nuisance consequently is of a temporary nature, and is also of a trifling character, the court will not interfere by injunction, for a man must have a house to live in ; and it is reasonable that he should make his own bricks out of his own land at a slight temporary inconvenience to his neighbours (*d*).

Of prescriptive rights to the exercise of a noisome trade.— If the trade is proved to be a noisome trade the defendant may, nevertheless, establish a prescriptive right to the exercise of the trade on the particular spot, by showing that he has exercised it without molestation or interruption for the period of twenty years (*e*). "It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not

(*z*) *Walters* v. *Selfe*, 4 De Gex & Sm. 323.

(*a*) *Stockport Waterworks Co.* v. *Potter*, 31 Law J., Exch. 15; 7 H. & N. 160.

(*b*) *Wanstead Local Board, &c.* v. *Hill*, 13 C. B., N. S. 470; 32 Law J., M. C. 135.

(*c*) Knight-Bruce, V. C., *Walter* v. *Selfe*, 4 De Gex & Sm. 323. *Pollock* v. *Lester*, 11 Hare, 266. *Beardmore* v. *Tredwell*, 31 Law J., Ch. 893. *Bamford* v. *Turnley*, ante, p. 135.

(*d*) *Att.-Gen.* v. *Cleaver*, 18 Ves. 219. *Cleeve* v. *Mahany*, 9 W. R. 882. *Cavey* v. *Lidbetter*, 13 C. B., N. S. 470; 32 Law J., C. P. 105.

(*e*) *Elliotson* v. *Feetham*, 2 Bing. N. C. 134. *Bliss* v. *Hall*, 5 Sc. 504.

recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. That, however, is not the law now" (*f*).

Nuisances from privies, chimneys, and manufactories—Liability of the landlord and occupier.—If a nuisance be created on premises, and a man purchases the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion with the existing nuisance, he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it (*g*).

A landowner who creates a nuisance upon his land, or purchases land with an existing nuisance upon it, cannot, by granting or conveying the land to another, get rid of his responsibility on the ground that he has no longer any control over the nuisance. "Before his assignment over he was liable for all consequential damages; and it is not in his power to discharge himself by granting it over; more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz. the rent, for the same: for surely, when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. Suppose the lessor or assignor had been seized in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and *causa causæ est causa causati*. And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it. And it is a fundamental principle of law and reason, that he that does the first wrong shall answer for all consequential damages; and the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated" (*h*).

If a landlord erects privies in such a situation that the use of them must necessarily create a nuisance, and the privies are demised to tenants who use them and create a nuisance, the landlord will be responsible for the erection and continuance of the nuisance (*i*). And whenever the very existence of the thing demised constitutes a nuisance, the landlord is responsible. This has been held to be the case where the thing demised consisted of a wall erected so as to impede the access to a public market (*k*),

(*f*) Byles, J., 4 C. B., N. S. 336; 27 Law J., C. P. 208.
(*g*) Littledale, J., 1 Ad. & E. 827.
(*h*) Per Cur., *Roswell* v. *Prior*, 12 Mod. 639. *Thompson* v. *Gibson*, 7 M. & W. 462.
(*i*) *Rex* v. *Pedly*, 1 Ad. & E. 822.
(*k*) *Thompson* v. *Gibson*, 7 M. & W. 456.

or obstruct the access of light and air to ancient windows (*l*); a dam or mound of earth stopping up the channel of a river or watercourse, or keeping a mill-pond at an undue elevation (*m*); a dangerous excavation made by order of the landlord, and left unguarded and unfenced, by the side of a public thoroughfare (*n*). But if the landlord demises tenements and premises which are not in themselves a nuisance, but may or may not become a nuisance, according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if he pleases. Therefore, where the landowner erected a coffee-shop with a low chimney under the plaintiff's windows, and let the coffee-shop to a tenant who lighted a fire in the chimney, and created a great smoke, which penetrated the plaintiff's dwelling-house and caused a nuisance, it was held that the landlord was not responsible for this nuisance, as the tenant could have burnt coke or charcoal in the chimney, and have used the chimney without necessarily creating a great smoke, or might have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house (*o*). An occupier who uses premises demised to him so as to create a nuisance is, of course, always responsible for the consequences of his wrongful act (ante, p. 134).

Defilement of springs and running streams.—We have already seen that the right to have a stream flow in its natural state is an incident to the property in the land through which it passes, and that all may reasonably use the water who have a right of access to it. Every person, therefore, who throws dirt and rubbish into the stream so as to block up the channel, or defiles the water with gas refuse and filth, and prevents the riparian proprietors and others from having the beneficial use of the water they have been accustomed to have, is guilty of a nuisance, and may be made responsible in damages (*p*), unless he has gained a prescriptive right to carry on an offensive trade on the river-bank, and corrupt the water (*q*).

Noisy nuisances.—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. Every person, therefore, who blows a horn in the night-time in the neighbourhood of a dwelling-house, so as to disturb the repose of the inmates, is guilty of a nuisance, and is responsible in damages, unless he can show some justification for the making of a noise (*r*). Every person, also, who erects a mill or a

(*l*) *Roswell* v. *Prior*, ante, p. 122.
(*m*) Roll's Abr. NUISANCE, K. 2.
(*n*) *Leslie* v. *Pound*, 4 Taunt. 649. *Bishop* v. *Trustees Bed. Charity*, 28 Law J., Q. B. 215; 1 Ell. & El. 697.
(*o*) *Rich* v. *Basterfield*, 4 C. B. 805.
(*p*) *Murgatroyd* v. *Robinson*, 7 Ell. & Bl. 391; 26 Law J., Q. B. 233. *Hodgkinson* v. *Ennor*, 32 Law J., Q. B.; 8 L. T. R., N. S. 451. *Stockport Water, &c. Co.* v. *Potter*, 32 Law J.
(*q*) Ante, p. 130. *Bealey* v. *Shaw*, 6 East, 214.
(*r*) *Rex* v. *Smith*, 2 Str. 703.

smith's forge, or any noisy machine, or carries on any noisy trade or manufacture adjoining a dwelling-house, whereby the comfort and quiet of the house are destroyed, and the rest of the inmates disturbed at night, is guilty of a nuisance, and is liable to an action for damages, unless he can show that he has gained a prescriptive right to make the noise by twenty years' user and enjoyment (*s*).

Collection of crowds.—It is an old principle of law, that if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. Therefore, where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected near the spot, trod down the grass of the neighbouring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance (*t*). So, where the defendant descended in a balloon into the plaintiff's garden, and a number of persons rushed into the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant who had set the balloon in motion and caused the mischief was responsible for the injury (*u*).

Injuries from spring-guns, man-traps, dog-spears, engines, and machines placed on land.—By 7 & 8 Geo. 4, c. 18, it is enacted, that any person who shall cause to be placed (s. 1), or shall knowingly and wilfully continue (s. 3), any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, shall be guilty of a misdemeanour: but the setting of any gun or trap, such as is usually set with intent to destroy vermin, is not (s. 2) to be thereby rendered illegal; nor the setting of a spring-gun, trap, or engine in a dwelling-house (s. 4), for the protection thereof in the night-time (*x*).

The setting dog-spears on land is not in itself an illegal act, nor is it rendered such by 7 & 8 Geo. 4, c. 18 (ante, p. 139), if it appears that the dog-spears were set in a wood for the mere purpose of destroying dogs trespassing in pursuit of game, and not with intent to destroy human life, or inflict grievous bodily harm on any human being. The owner of a dog, therefore, passing with his dog through a wood, has no right of action against the owner of the wood for the death of, or for an injury to,

(*s*) *Bradley* v. *Gill*, 1 Lutw. 69. *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; 2 Sc. 174. Ante, p. 136. *Soltau* v. *De Held*, 2 Sim. N. S. 133.

(*t*) *Rex* v. *Moore*, 3 B. & Ad. 188.

(*u*) *Guille* v. *Swan*, 19 Johns. (U. S. R.), 381.

(*x*) *Bird* v. *Hollrook*, 4 Bing. 628. *Deane* v. *Clayton*, 7 Taunt. 489. *Ilott* v. *Wilkes*, 3 B. & Ad. 304.

his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured (*y*).

Injuries to animals from dog-traps.—Every man must be taken to contemplate the probable consequences of the act he does, and, therefore, where the defendant caused traps scented with the strongest meats to be placed on his own land, so near to the plaintiff's house as to influence the instinct of the plaintiff's dogs and cats, and draw them irresistibly to their destruction, it was held that the defendant was responsible to the plaintiff for the injuries he sustained, although he had no intention of injuring the plaintiff, and meant only to catch foxes and vermin. It was held also, that the defendant would be responsible for injuries sustained by any dogs tempted from the highway, or a public path, to the traps on the defendant's land, as he had no right to invite them there for the purpose of destroying them (*z*).

Injuries from unguarded wells, mining-shafts, areas, and cellars.—Where the surface of land is in possession of one man, and the subsoil and minerals in the possession of another, and the mineral owner sinks a mining shaft to enable him to work the minerals, it is his duty to fence the shaft so as to prevent injury to the cattle and sheep depasturing upon the surface (*a*). If a man hires a meadow, and turns his cattle therein, and they fall down the disused shaft of a mine, the person to whom the shaft belongs, and who has the dominion and control over it, will be responsible for the damage done (*b*). Every occupier of land who allows wells or mining-shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons who sustain injury from falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if they were at the time trespassers on the land, and the well or shaft was more than twenty-five yards from a public carriage-way (post, p. 142), they would not be entitled to maintain an action (*c*). Where the defendants were owners of waste land which was bounded by two highways, and the defendants worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark and fell into the quarry and broke his leg, and then brought an action for damages, it was held that the action could not be maintained, as there was no legal obligation on the defendant to fence the quarry for the benefit of the plaintiff, who was a mere trespasser upon the land (*d*).

(*y*) *Jordin* v. *Crump*, 8 M. & W. 787.
(*z*) *Townsend* v. *Wathen*, 9 East, 277.
(*a*) *Williams* v. *Groncott*, 2 N. R. 420; 8 L. T. R., N. S. 459.
(*b*) *Sybray* v. *White*, 1 M. & W. 435.
(*c*) *Hardcastle* v. *South York, &c. Rail. Co.* 4 H. & N. 67; 28 Law J., Exch. 139. *Bishop* v. *Trustees Bed. Char.* Ell. & Ell. 697. *Pickard* v. *Smith*, 10 C. B., N. S. 470.
(*d*) *Hounsell* v. *Smyth*, 7 C. B., N. S. 731; 29 Law J., C. P. 203. *Binks* v. *South York & River Dun Co.* 32 Law J., Q. B. 26; 3 B. & S. 244.

If a man gets upon strange premises when it is dark, so that he cannot see, he should keep a good look-out, and has only himself to blame if he sustains injuries from running against objects, or falling down places, which might have been avoided by the exercise of ordinary care and caution (*e*).

Every owner of a house adjoining a highway is bound to secure his shutters, and swing-doors, and things placed against his house, so that they cannot be readily thrown down on passengers by idle or mischievous persons. Thus, where the cellar-door of a tradesman was opened and thrown back against his house, and some little boys playing with the door threw it over upon the plaintiff and broke his leg, it was held that the tradesman was responsible for the injury, as he had provided no fastening to keep the door back. "A tradesman under such circumstances is not bound to adopt the strictest means for preventing accidents, but he is bound to use reasonable precaution, such as might be expected from a careful man" (*f*). But if the door is a door of great weight, and so thrown back that it could not be pushed forward into the street without the exercise of great force and strength, the remedy would be against the wilful wrong-doer and not against the tradesman, who reasonably supposed a fastening to be, under such circumstances, unnecessary. Whether proper care has been taken to prevent the door from falling forward is a question for the jury.

Injuries from the dangerous state of private ways. — If landowners have given an express or implied permission to strangers to use a private way leading across their lands, or if they suffer a particular pathway to be used as the ordinary means of access to their dwelling-houses, it is not competent to them to do any act whereby injury may arise to persons using the way, without giving them timely notice of what has been done, or revoking the license or permission to come upon the land. And as the owners themselves are not justified in placing any unknown dangers in the way of persons using the private way, so neither can they authorise anybody else to do so (*g*). If the landowner takes toll for the use of the way, and invites people to use it, it is his duty to keep it in a safe state, and fit for use; and if he is cognizant of some hidden danger, he ought to remove it, or close the way to the public (*h*). Every occupier of a house who makes or permits the continuance or use of a pathway to the house, may fairly be deemed to hold out an invitation to all persons who have any reasonable ground for coming to the house to pass along his pathway; and he is responsible for neglecting to fence off dangerous

(*e*) *Wilkinson* v. *Fairrie*, 32 Law J., Ex. 173.

(*f*) Tindal, C. J., *Daniels* v. *Potter*, 4 C. & P. 262. *Proctor* v. *Harris*, ib. 337.

(*g*) *Corby* v. *Hill*, 4 C. B., N. S. 556; 27 Law J., C. P. 320. *Gallagher* v. *Humphery*, 10 W. R. 604; 6 L. T. R. N. S. 684.

(*h*) *Gibbs* v. *Trustees of Liv. Docks*, 3 H. & N. 164; 27 Law J., Exch. 321.

places, in the same way that a shopkeeper, who invites the public to his shop, is liable for leaving a trap-door open without any protection, by which his customers suffer injury (*i*). But a person who strays from the ordinary approaches to the house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury he may sustain from falling into unguarded wells or pits, as the injury is the result of his own carelessness and misconduct (*k*). If A gives B permission to cross his yard, across which there are a dozen different routes, and A has dug a hole in the yard which he usually keeps covered, but one night he uncovers it, and B, crossing as usual and not expecting any danger, falls in and is injured, A is liable for the injury. But if the hole has always been uncovered and B walks into it in broad daylight, he has no cause of action against A (*l*).

Nuisances adjoining highways—Dangerous pits and excavations—Steam-engines and windmills.— By the General Highway Act, 5 & 6 Wm. 4, c. 50, s. 70, it is enacted, that it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards from any part of any carriage-way or cart-way, unless such pit, or shaft, or steam-engine, gin, or other like engine or machinery, shall be within some house or other building, or behind some wall or fence, sufficient to conceal or screen the same from the said carriage-way or cart-way, so that the same may not be dangerous to passengers, horses, or cattle (*m*); also, that it shall not be lawful for any person to make or cause to be made any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of coke, within fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building, or behind some wall or fence sufficient to screen the same from such carriage-way or cart-way. Penalties are imposed upon persons offending against the statute for each and every day that any such pit, shaft, windmill, steam-engine, gin, machine, or fire, shall be permitted to continue contrary to the provisions of the act.

Penalties are also imposed (s. 72) upon persons playing at games on highways, to the annoyance of the passengers, or making fires, or letting off fireworks, pistols, or guns within fifty feet of the centre of the way, or laying things on the highway, to the interruption of persons travelling thereon, or suffering filth or any offensive matter to flow upon the high-

(*i*) Tindal, C. J., *Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & E. 243. *Barnes* v. *Ward*, 9 C. B. 420; 19 Law J., C. P. 200. *Jarvis* v. *Dean*, 11 Moore, 354.

(*k*) Wilde, B., *Bolch* v. *Smith*, 7 H. & N. 736; 31 Law J., Exch. 203.

(*l*) *Blythe* v. *Topham*, 1 Roll. Abr. 88; Cro. Jac. 158. *Stone* v. *Jackson*, 16 C. B. 204. *Hardcastle* v. *South York, &c.* 4 H. & N. 74.

(*m*) As to nuisances from steam-threshing machines, *Smith* v. *Stokes*, 8 L. T. R., N. S. 424.

way from the adjoining premises, or in any way wilfully obstructing the passage of the highway. Provision is also made (s. 73) for the removal and abatement of all nuisances upon the highway.

The use of locomotive steam-engines on highways is authorised by 24 & 25 Vic. c. 70, provided they are used (s. 13) so as not to create a nuisance (*n*).

Dangerous excavations adjoining highways.—As persons are prohibited from sinking pits or shafts within the distance of twenty-five yards from any part of a carriage-way or cart-way, being a highway, it follows that any person who has sustained injury from the doing of the prohibited act is entitled to an action to recover compensation in damages from the wrong-doer; and it is no answer to such an action to show that he had deviated from the highway, and was a trespasser upon the adjoining land, at the time he sustained the injury: but when the excavation is made beyond the distance of twenty-five yards from the carriage-way, and does not immediately adjoin any footpath or public place of passage where all persons have a right to go, and there is no obligation imposed upon the landowner on whose land the excavation has been made to fence it off, and the person falling into it would be a trespasser upon the intervening land before he reached the excavation, no action would be maintainable by the injured party (*o*).

Where the occupier of a dangerous area adjoining a highway set up as a defence that the premises had been exactly in the same condition as far back as could be remembered, and many years before he took possession of them (*p*), Lord Ellenborough held that, however long the premises might have been in a dangerous state, the defendant, as soon as he took possession of them, was bound to guard against the danger to which the public had been before exposed; and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance; that the area belonged to the house, and the law cast upon the occupier the duty of rendering it secure (*q*). No question was raised in this case, however, as to whether the highway existed before the area was made: for if the area had been made, and the road afterwards dedicated to the public with the unfenced area beside it, the public would take the right of way subject to the danger and inconvenience of the unfenced area (*r*).

Dedication of a highway to the public subject to certain risks and incon-

(*n*) *Watkins* v. *Reddin*, 2 F. & F. 269.

(*o*) *Hardcastle* v. *South York, &c. Rail. Co.* 4 H. & N. 74; 28 Law J., Exch. 139. *Blyth* v. *Topham*, Cro. Jac. 159. *Hounsel* v. *Smith*, *Binks* v. *South York & River Dun Co.* ante, p. 140.

(*p*) *Barnes* v. *Ward*, 9 C. B. 420; 19 Law J., C. P. 200. *Jarvis* v. *Dean*, 11 Moore, 354.

(*q*) *Coupland* v. *Hardingham*, 3 Campb. 398. *Bishop* v. *Trustees Bed. Charity*, *Pickard* v. *Smith*, ante, p. 140.

(*r*) Blackburn, J., *Fisher* v. *Prowse*, 31 Law J., Q. B. 219; 6 L. T., N. S. 711.

veniences.—When a highway is dedicated to the public by the owner of the soil, the public can take no larger or more extensive right than the owner of the fee thinks fit to grant or allow (post, s. 3). If, therefore, the right of passage has been granted subject to a right vested in the adjoining landowners of depositing goods on the soil of the way, the public must take the right subject thereto (*s*). So if the highway has been dedicated subject to the right to have door-steps or cellar-flaps projecting into it, the public must take the road as it is given to them, subject to those inconveniences and obstructions (*t*).

Where an ancient unfenced tidal ditch ran alongside a public highway, and the commissioners of sewers took possession of the ditch under the powers of an act of parliament, for the purpose of their sewerage, and the plaintiff, on a dark night, tumbled into the ditch with his horse and carriage, it was held that the commissioners of sewers were not responsible for the injury, as the highway and the ditch had immemorially existed in the same state, and the commissioners were under no obligation to fence it off from the road. "The road," observes Parke, B, "was dedicated to the public with the ditch beside it. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer" (*u*). But whenever a highway has been dedicated to the public, subject to certain obstructions left in it for the convenience and accommodation of the occupiers of the adjoining houses, the obstruction or inconvenience to the public must not be increased by any act of commission or omission. Cellar-doors or cellar-flaps must not be left open or unfastened, so as to expose the public to any unusual, unexpected, or unforeseen danger. And all things accessorial to the beneficial use and occupation of the adjoining dwellings must be kept in a proper and safe state, either by the occupiers of the houses or those upon whom the law casts the burthen and duty of repairs (*v*).

Obstruction in public thoroughfares.—"If a man hangs a gate upon a post, and shuts it with a catch upon another post across a highway used for horses and carriages, so that men on horseback or in carriages cannot pass without opening the gate, this is a common nuisance," for a man has no right to put such an impediment in the road where none before existed. But gates which have been in highways time out of mind are not any nuisance, because it may be intended that they began by composition with the owner of the land when he consented to the way (*x*).

Whenever one man wilfully interferes with the free right of passage

(*s*) *Morant* v. *Chamberlin*, 6 H. & N. 541; 30 Law J., Exch. 299. *Le Neve* v. *Mile End, &c. Vestry*, 8 Ell. & Bl. 1063.

(*t*) *Cooper* v. *Walker*, *Fisher* v. *Prowse*, 31 Law J., Q. B. 213.

(*u*) *Cornwall* v. *Metrop. Com. of Sewers*, 10 Exch. 771. Blackburne, J., *Fisher* v. *Prowse*, ante, p. 143.

(*v*) *Daniels* v. *Potter*, *Proctor* v. *Harris*, ante, p. 141.

(*x*) Vin. Abr. NUISANCE, C. *James* v. *Hayward*, Cro. Car. 184; W. Jones, 221.

of another along a public highway, there is an injury to a right, and an action for damages is maintainable. And whenever a private injury has been sustained from an unauthorized obstruction in a public thoroughfare, the injured party is entitled to compensation in damages. If one person wilfully and intentionally runs his carriage before another person's carriage in a public thoroughfare, stopping when he stops, and going ahead of him when he goes on, and crossing his path, so as to prevent him from having the free and uninterrupted use of the highway, and oblige him to pull up or slacken speed, for fear of a collision, the person so obstructing the public thoroughfare will be guilty of a nuisance, and responsible in damages to the party whose free right of passage has been wilfully and unlawfully obstructed. There is, in such a case, an injury to a right, and substantial damages are recoverable. Where, therefore, the drivers of an omnibus company headed and tailed the omnibus of a private individual with the company's omnibuses, and obstructed the highway with their vehicles, so as to create a nuisance, and interrupt the free passage of the thoroughfare, it was held that the omnibus company was responsible in damages to the private omnibus proprietor, who had been wilfully delayed and impeded in the exercise of his right to pass along the public highway (*y*).

If a man builds a house or a bridge, so as to obstruct a public thoroughfare, he cannot escape from liability by saying that it was the fault of the builder or contractor, in not constructing it in some different manner (*z*). If the occupier of a house or building adjoining a highway directs certain repairs to be done to his house, and it becomes necessary to excavate the earth, and remove stone, timber, and materials from the premises, and the excavated earth and materials are placed in the high-road, in front of the house, with the knowledge and sanction of the occupier of the house, the latter will be responsible for the obstruction, although it was placed there by the servants or workmen of a builder or contractor. If, seeing the obstruction and the danger of it, and having control over everybody working upon his own land, and bringing materials out of his own house, he does *nothing* to prevent or abate the nuisance, if he silently acquiesces in the conversion of the highway into a place of deposit for materials brought from his own premises, there will be evidence to go to a jury of the things having been placed in the highway by his authority (*a*).

So, by the civil law, every occupier of a house, whether he was the proprietor of it or a lessee, was held liable for damage caused by anything thrown out of the house, or the premises belonging to it, into a street or

(*y*) *Green* v. *Lond. Gen. Omnib. Co.* 7 C. B., N. S. 290; 29 Law J., C. P. 13.

(*z*) *Hole* v. *Sittingbourne, &c. Rail. Co.* 6 H. & N. 500; 30 Law J., Exch. 81.

(*a*) *Burgess* v. *Gray*, 1 C. B. 591. *Bush* v. *Steinman*, 1 B. & P. 408. *Ellis* v. *Sheff. Gas Co.* 23 Law J., Q. B. 42; post, s. 2.

public thoroughfare, or any other place. And the occupier was held responsible for the damage, if the thing was done by any of his family or domestics in his absence, or without his knowledge (*b*).

Obstructions in navigable rivers.—The right of soil in arms of the sea and public navigable rivers, which is *primâ facie* vested in the crown, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired, and any grantee of the crown must, of course, take subject to such right. If, therefore, he places any obstruction in the bed of the river, which deprives another of his right of free passage along it, he is liable to an action for the private and particular injury to the individual (*c*). But if the obstruction has not deprived any particular individual of his right of passage along the stream, or caused him any personal damage different from, and independent of, that which is sustained by the rest of the public, an action for damages is not maintainable, but the public remedy, by way of indictment, must be pursued (*d*). If oysters and oyster-brood are so placed in a navigable creek or river, and in such masses, as unlawfully to diminish the depth of water and obstruct the navigation, a shipowner or shipmaster is not, by reason thereof, justified in negligently or wilfully running his vessel upon the oyster-beds, and destroying the oysters, if there was abundance of room and water for the vessel to have passed up the river without going upon the beds (*e*).

Obstructions from sunken vessels.—The owner of a ship sunk in a navigable river by accident, without his default or misconduct, is not bound to remove the nuisance, if the vessel is totally submerged, and he has no longer the possession of it; but if he has possession of the vessel, and exercises the dominion and control of an owner over it, he is bound to take all reasonable and proper care to prevent accidents to other vessels navigating the river, and must remove the obstruction with all reasonable diligence. This duty attaches to the ownership of the vessel for the time being, and will be transferred to a purchaser of the sunken vessel, who takes the wreck into his possession, and under his management and control (*f*).

Where the public right of free navigation is taken away, and the power of removing obstructions is vested in the hands of conservators of the river by act of parliament, there can be no redress by way of action on account of any disturbance of the individual right. The individual grievance is only accessory, and, the principal being taken away, the accessory follows (*g*).

(*b*) Domat. Droit. Civ. liv. 2, tit. 8, s. 1. Pandect, lib. 9, tit. 3. Instit. lib. 4, tit. 5, s. 1.

(*c*) *Rose* v. *Groves*, 6 Sc. N. R. 653; post, s. 2.

(*d*) *Dimes* v. *Petley*, 15 Q. B. 283.

(*e*) *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*f*) *White* v. *Crisp*, 10 Exch. 312; 23 Law J., Exch. 317.

(*g*) *Kearns* v. *Cordwainers' Co.* 6 C. B., N. S. 388; 28 Law J., C. P. 285.

Injuries to land from the erection of groins, sea-walls, and defences against tides and currents.— Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defences, for the protection of his land from the inroads of the sea, although, by so doing, he may cause the sea to flow with greater violence against the land of his neighbour, and render it necessary for the latter to protect himself by the erection of similar sea-defences. "Each landowner has a right to protect himself, but not to be protected by others, against the common enemy." But a man has no right to do more than is necessary for his defence, and to make improvements at the expense of his neighbour (*h*).

Negligent overloading of the floors of warehouses and buildings.— If one man overloads the floor of a warehouse with merchandise, so that the floor breaks and crushes the goods of another man in the floor underneath, the latter is entitled to an action for damages against the former. If the floor is ruinous, the occupier must take good care that he does not put upon such ruinous floor more than it can well bear; and if it will not bear anything, he ought not to put anything upon it to the prejudice of another. Where the defendant, who was the lessee and occupier of a warehouse, underlet a cellar beneath the warehouse to the plaintiff, and the defendant so overburthened the floor of the warehouse with merchandise that the floor gave way, and crushed the plaintiff's wine in the cellar, it was held that the defendant was responsible for the injury, and that it was no answer to the action to say that the floor was ruinous, and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he put into it at his peril, that it be not so much that another shall take any damage by it. But if the floor had fallen of itself, without any weight put upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, there the defendant shall be excused" (*i*).

Non-repair of ruinous houses—Liability of the landlord and occupier.— As between the landlord and occupier of a house, or the landlord and tenant, there is no obligation upon the landlord to keep the house in repair, in the absence of an express contract to that effect. If, therefore, the chimney of a house demised to a tenant becomes ruinous, and falls through the roof of the house, and injures the furniture and family of the tenant, the latter has no remedy against his landlord for the injury (*k*). But the landlord is responsible to the public, and to the occupiers and proprietors of the adjoining property, if he demises houses which are in a ruinous state, and dangerous to the neighbourhood, either from original

(*h*) *Rex* v. *Pagham Commissioners, &c.* ante, p. 3.

(*i*) *Edwards* v. *Halinder*, Poph. 46.

(*k*) *Gott* v. *Gandy*, 2 El. & Bl. 847; 23 Law J., Q. B. 1.

faulty construction, or from want of proper and timely repair (*l*). But if the houses or buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighbourhood, the landlord is not, it seems, responsible for the nuisance, unless he has taken upon himself the burthen of repairing and maintaining the premises during the existence of the lease (*m*), or has renewed the lease after the houses had become ruinous and in danger of falling (ante, pp. 137, 138). The occupier is also responsible for the nuisance; and it is no answer for him to say that he is a mere tenant-at-will or upon sufferance, or has only a temporary or precarious interest in the premises, and is under no obligation to maintain and repair them; for if he chooses to take the benefit of the occupation of premises, he must take them with the accompanying burthen of preventing them from becoming a source of danger to others.

Thus, where the defendant was indicted for not repairing a ruinous house abutting upon a highway, and the indictment charged that the house was likely to fall down, and that the defendant occupied it, and ought to repair it, and the jury found that the house was ruinous and likely to fall, and that the defendant occupied it, but was only tenant-at-will, the court held that he was nevertheless answerable to the public for its dangerous condition (*n*). But the liability of a mere tenant-at-will, in this respect, ought in reason to be confined to cases where he knew or ought to have known that the house was in a dangerous state, and chose to become and continue the occupier of it, with knowledge of its dangerous condition. All that the occupier is bound to do, in any case, is to shore up the building so as to prevent it from falling. He is not bound, as between himself and the public or the neighbours, to put it into a state of repair.

By the civil law, wherever anything hung out from a house happened to fall and injure another, the occupier of the house was held responsible in damages for the injury; but if tiles fell from the roof from the effect of a storm, and the roof was in good repair, the occupier was not answerable for the accident. If the roof was out of repair, then the person bound to keep it in repair was guilty of a breach of duty, and was answerable for the damage to the party injured (*o*).

Negligence in pulling down houses — Negligent excavations. — It is the duty of all persons to use due care and skill, and take due, reasonable, and proper precautions in pulling down houses and walls which rest against, or are in contact with, an adjoining house or wall; and if an

(*l*) *Todd* v. *Flight*, 9 C. B., N. S. 377; 30 Law J., C. P. 21; ante, p. 137. *Rex* v. *Pedly*, 1 Ad. & E. 822.

(*m*) *Payne* v. *Rogers*, 2 H. & Bl. 349. *Leslie* v. *Pounds*, 4 Taunt. 648. *Bishop* v. *Trustees Bed. Charity*, Ell. & Ell. 697.

(*n*) *Reg.* v. *Watts*, 1 Salk. 357.

(*o*) Domat. liv. 2, tit. 8, ss. 1, 10, 11.

injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrong-doer is responsible for the damage (*p*); and it is no answer to an action for damage done to set forth that the damage was repaired by the defendant before action, but the fact must be given in evidence in reduction of damages (*q*). If a man negligently and carelessly excavates his own land close to the foundations of his neighbour's house without giving the latter any warning, or giving him an opportunity of shoring up or protecting his house, the careless excavator will be responsible for the damage he occasions (*r*). But the duty of taking care does not arise where the excavator is ignorant of the existence of the thing which may be injured by the want of care. Thus, where a landowner excavated in his own land close to a cellar of his neighbour's, not knowing of the existence of the cellar, it was held that he could not be made responsible for an injury to the cellar (*s*); no right to support having been gained by long enjoyment (ante, p. 101).

Ruinous party-walls.—If injury results from the non-repair of a party-wall, of which the plaintiff and defendant are tenants in common, and there has been a neglect of the duty to repair on the part of the plaintiff, as well as on the part of the defendant, the plaintiff cannot recover damages (*t*).

In Fitzherbert's Abridgement we read, "that where there are three tenants in common, or joint tenants of a mill or house which falls to decay, and one will repair but the others will not repair the same, he shall have a writ *de reparatione faciendâ* against them, and the writ is such, &c. And so, if a man have a house adjoining to my house, and he suffer his house to lie in decay to the annoyance of my house, I shall have a writ against him to repair his house in such form: 'Command A that, &c. he cause to be repaired his certain house in N, which threatens destruction to the nuisance of the freehold of B, in the same town, which he ought and hath been used to repair'" (*u*).

Insecure fences, hedges, and gates.—When lands are burthened by grant or prescription with the servitude of maintaining a wall, fence, hedge, or gate for the benefit of the adjoining land (ante, p. 102), the occupier of the servient tenement will, as we have seen, be responsible in damages to the occupier of the dominant tenement if he allows the wall, fence, &c., to be ruinous and defective, so that cattle and sheep break through the fence and stray from one tenement to the other. The occupier of the

(*p*) *Trower* v. *Chadwick*, 3 Sc. 722; 3 Bing. N. C. 334; 8 Sc. 19. *Walters* v. *Pfiel*, 1 M. & M. 365. *Davies* v. *Lond. & Bl. Rail. Co.* 2 Sc. N. R. 74; 1 M. & Gr. 799. And see ante, pp. 46–48, 73, 101, 102.

(*q*) *Taylor* v. *Stendall*, 7 Q. B. 634.

(*r*) *Dodd* v. *Holme*, 1 Ad. & E. 506. *Bradbee* v. *Christ's Hosp.* 4 M. & Gr. 758. *Massey* v. *Goyder*, 4 C. & P. 165. *Jones* v. *Bird*, 5 B. & Ald. 837.

(*s*) *Chadwick* v. *Trower*, 8 Sc. 20; 6 Bing. N. C. 1.

(*t*) *Chauntler* v. *Robinson*, 4 Exch. 163.

(*u*) Fitz. Nat. Brev. 127; Co. Litt. 56 b. This writ was abolished by 3 & 4 Wm. 4, c. 27, s. 36.

servient tenement is entitled to the benefit of his field for turning in other people's cattle as well as his own stock; and if he takes in another man's horse, and the horse gets through a ruinous fence, which the adjoining occupier ought to have repaired, and falls into a pit on the adjoining land and is killed, the occupier who ought to have repaired the fence is, as we have seen, responsible for the full value of the horse to the occupier of the field from which the horse strayed (*x*).

Railway fences—Statutory servitude imposed upon railway companies of keeping up and maintaining fences.—The General Railway Act, 8 & 9 Vict. c. 20, which enacts (s. 68) that railway companies shall make and maintain fences for separating the land taken for the use of the railway from the adjoining lands, and preventing the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, applies only to adjoining land of other persons (*y*), and does not impose upon railway companies any greater liability in respect of the maintenance of fences than is imposed by the common law upon occupiers who are bound to maintain and repair fences for the benefit of the adjoining occupiers (*z*). Railway companies, therefore, are not bound to fence against trespassers upon the adjoining lands, and persons who are neither owners nor occupiers thereof. Where the plaintiff's sheep escaped from his own land into the adjoining close, and were trespassing there, and then passed on to the defendant's railway, from defect of fences, and were killed by a train, it was held that the defendants were not responsible for the injury; for the plaintiff was not the owner or occupier of land adjoining the railway, and the company, consequently, was not bound to fence against him (*a*). And where cattle strayed into a highroad adjoining a railway, and through defect of fences got upon the railway and were killed, it was held that the company was not responsible for the injury, as the cattle were trespassers on the highway, and the owners of the cattle were not occupying the road with their cattle at the time they strayed from the road on to the railway (*b*).

But if cattle are passing along a highway under the care of the servants of the owner, the latter is lawfully using the way, and is deemed to be a temporary occupier of the highway, and, consequently, an occupier of land adjoining the railway within the words of the statute, so as to render it incumbent upon the company to maintain fences for the safety of his cattle so traversing the highway. Where a colt strayed from a field on to a public road, and the servants of the owner of the colt went in pursuit

(*x*) *Rooth* v. *Wilson*, 1 B. & Ald. 59; ante, p. 129.

(*y*) *Marfell* v. *South Wales Rail. Co.* 8 C. B., N. S. 525; 29 Law J., C. P. 315.

(*z*) *Manch. Sheff. & Linc. Rail. Co.* v. *Wallis*, 14 C. B. 224; 23 Law J., C. P. 85; ante, p. 122. See, however, *Bessant* v. *Gt. West. Rail. Co.* 8 C. B., N. S. 368.

(*a*) *Ricketts* v. *East & West Ind. &c.* 12 C. B. 174.

(*b*) *Manch. Sheff. & Linc. Rail. Co.* v. *Wallis*, 14 C. B. 224; 23 Law J., C. P. 85.

of it, headed it, and drove it back along the highway towards the field from which it had escaped, and the colt turned through an open gate into a coal-yard abutting upon a railway, and not fenced therefrom, and passed on to the railway, and was killed by a passing train, it was held that the railway company was responsible for the accident, as the owner's servants were in the act of driving the colt home at the time it escaped through the open gate, and the colt was not then trespassing upon the highway (*c*). But there is no duty imposed by statute or by the common law upon railway companies to fence off from their railway their own yards and inclosures around their stations; and if cattle left in their yards stray therefrom, from the want of such fences, and get on the railway, and losses arise, the company is not responsible for such losses, unless it be shown that the cattle were under the care of the company's servants, and that they had failed to take proper means to prevent the cattle from straying (*d*).

Negligent use and management of railway stations—Insufficient lights and guards.—It is not sufficient for the lights at the station of a railway company to be quite sufficient for the company and their own servants, who know the premises, and are perfectly conversant with the approaches. It must be enough to guide and direct strangers who are wholly unacquainted with the locality. A degree of light which will enable a person who is familiar with a place to see all about him, and understand where he is, may not be sufficient to enable a person who is unacquainted with, or has an imperfect knowledge of, the locality, to find his way or to guard against danger. "Railway companies are to light their railway," observes Maule, J., "not for their own servants alone, but for persons who have never been there before, and who may be in a great hurry to reach the train; and they are to light it so as to enable them to see their way . . . If they choose to allow people to cross the line at the last moment, they should have a person to point out to passengers who are in a hurry the right course for them to take; or if they have not a man, they might have a board pointing to the direction: for they are bound to do what is needful for the safety of their passengers." Where, therefore, the plaintiff, being on his return-journey with a return-ticket, and, having got to the wrong side of the railway, crossed the line to get to the return-train at a place where there was no proper crossing, there being no person to point out to him the proper crossing, and fell over a switch-handle, which he could not see for want of light, it was held that the company was responsible for the injury he sustained (*e*).

(*c*) *Mid. Rail. Co.* v. *Daykin*, 17 C. B. 129.

(*d*) *Roberts* v. *Gt. West. Rail. Co.* 4 C. B. 506; 27 Law J., C. P. 266. *Marfell* v. *S. Wales Rail. Co.* 8 C. B., N. S. 534.

(*e*) *Martin* v. *Gt. Northern Rail. Co.* 16 C. B. 180; 24 Law J., C. P. 209. *Birket* v. *Whitehaven Junc.* 4 H. & N. 730; 28 Law J., Exch. 348.

But, in order to make out a case of negligence or of neglect of duty on the part of the company, it must be shown that they used or managed their property in such a way as to render it likely to be a source of danger to their passengers, and persons lawfully using the station (*f*). It is not enough to show that they have doors opening upon the platform, and steps leading from those doors, and that the plaintiff tumbled down the steps, without showing that the steps are more than ordinarily dangerous (*g*). Nor is it enough to show that the company had a weighing-machine on the platform, and that the plaintiff tumbled over it. In these cases it is always a question whether the mischief could reasonably have been foreseen, and whether precautions ought not to have been taken to guard against it (*h*). Where rules are promulgated by a railway company for the management of a station, and injuries are caused by the servants of the company endeavouring to carry these rules into effect, the company is responsible in damages, unless the injured party brought the mischief upon himself by his own negligence (*i*).

Ruinous and insecure railway-bridges, viaducts, and embankments.— Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or viaduct, or by passengers travelling along the line from the ruinous and insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor (*k*). If a railway embankment has been injured by some wholly unexpected and extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers (*l*); but every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely to occur, and if it fails in this duty it will be responsible in damages for negligence (*m*).

Neglect of railway companies to erect and maintain bridges over highways.—By 8 & 9 Vict. c. 20, s. 46, it is further enacted, that if the line

(*f*) *Burgess* v. *Gt. West.* 32 Law T. R. 76.

(*g*) *Toomey* v. *Lond. & Br. Rail. Co.* 3 C. B., N. S. 146; 27 Law J., C. P. 39.

(*h*) *Cornman* v. *East. Co. Rail. Co.* 4 H. & N. 785; 29 Law J., Exch. 94.

(*i*) *Vose* v. *Lanc. & York Rail. Co.* 2 H. & N. 728; 27 Law J., Exch. 249; post, ch. 5.

(*k*) Ante, pp. 141, 142. *Chester* v. *Holyhead Rail. Co.* 2 Exch. 251.

(*l*) *Withers* v. *North Kent Rail. Co.* 27 Law J., Exch. 417.

(*m*) *Gt. West. Rail. Co. of Canada* v. *Fawcett*, 9 Jur. N. S., P. C. C. 339; 8 L. T. R., N. S. 31.

of railway cross any turnpike-road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, to be maintained at the expense of the company, but it is provided that, with the consent of two or more justices in petty sessions, it shall be lawful for the company to carry the railway across any highway other than a public carriage-road on the level.

Negligent management of railway-gates placed across public carriage-roads.— When a railway crosses any turnpike-road, or public carriage-road on a level, the company must (8 & 9 Vict. c. 20, s. 47), unless otherwise authorised by their special act, erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and employ proper persons to open and shut such gates, and keep them constantly closed across the road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the road shall have to cross the railway; and the gates must be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway.

Wherever this section of the statute, or one of a similar import, is in force, it imposes upon the railway company governed by it the duty of closing the gates across public carriage-roads carefully against everything passing lawfully or unlawfully along the highroad. Where, therefore, the plaintiff's horses strayed from his field into the highroad, and passed from thence through an open gate, and got upon a railway, and were killed by a passing train, it was held that the railway company was responsible for the loss, as the obligation to keep the gates closed imposed upon them the duty of closing them carefully against everything passing lawfully or unlawfully along the highroad (*n*).

Negligent management of gates placed across tramways.—Where a railway company were the owners of a tramway which crossed their railway on a level, and which tramway they allowed the public to use on payment of toll, it was held that the law imposed upon the railway company the duty of taking all reasonable precautions for the protection of the public using the tramway, and where fences and gates are put up for the protection of the public, the company is responsible for the consequences resulting from their negligently leaving the gates open (*o*).

Leaving open accommodation gates.—By 8 & 9 Vict. c. 20, s. 75, it is further enacted, that if any person omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he, and the carriage, cattle,

(*n*) *Fawcett* v. *York & North Mid. Rail. Co.* 16 Q. B. 618.

(*o*) *Marfell* v. *South Wales Rail. Co.* 8 C. B., N. S. 535.

or other animals under his care have passed through the same, he shall forfeit for every such offence a sum not exceeding forty shillings.

No duty is imposed upon railway companies to watch and keep closed gates put up for the accommodation of an adjoining landed proprietor, whose land extends along both sides of a railway. And where a railway company provides the adjoining landowners with keys for the gates, the company is not responsible for the destruction of cattle straying upon the line in consequence of the gates being left open (*p*) or insecurely fastened. And if the plaintiff had the means of making the gate secure, and neglected them, his own neglect in the matter will be a bar to the maintenance of an action against the railway company for the injury he has thereby sustained (*q*).

Dangerous canals.—Every canal company, so long as it keeps its canal open for the public use of all who may choose to navigate it, is bound to take reasonable care that they may navigate it without danger to their lives or property (*r*). Every canal company is bound also to take all reasonable and proper precautions for the protection of the public, where the canal intersects public thoroughfares. In such cases there is a common-law obligation on the company to make and maintain sufficient bridges, with proper rails and lights, such as all persons passing along the highway can safely use. When the highroad traverses the canal by a swing-bridge, and the bridge is opened for the passage of boats and vessels, the company is bound to provide sufficient lights, or persons to watch and warn passengers, or to have some apparatus attached to the bridge itself, to protect passengers when the bridge is open, and prevent them from falling into the water (*s*). But if the canal has been demised to a lessee, who is in the actual possession and occupation of it, and who receives the toll for the use of it, it is not then the duty of the proprietors of the canal to maintain and repair the canal, unless the particular statute under which they are incorporated expressly imposes that duty upon them (*t*). A canal company is not bound, however, to fence off its canal from an adjoining thoroughfare, unless it is "so near thereto as to be dangerous to persons using the road in the line of the road (*u*).

Negligent management of docks.—A duty is cast upon trustees and commissioners who have the receipt of the tolls and the possession and management of a dock vested in them, to keep the entrance to the dock

(*p*) *Ellis* v. *Lond. & S. W. R. Co.* 2 H. & N. 429; 26 Law J., Exch. 349.

(*q*) *Haigh* v. *Lond. & North-West. Rail. Co.* 8 W. R., Q. B. 6.

(*r*) *Lanc. Canal Co.* v. *Parnaby*, 11 Ad. & E. 243. *Gibbs* v. *Trustees Liv. Dock*, 27 Law J., Exch. 321; 3 H. & N. 164.

(*s*) *Manley* v. *St. Hel. Can. & Rail. Co.* 2 H. & N. 840; 27 Law J., Exch. 164.

(*t*) *Walker* v. *Goe*, 4 Exch. 350; 27 Law J., Exch. 427. As to the common-law duty of the actual occupier to keep his premises in such a state as not to be a source of annoyance to his neighbours, see ante, p. 134.

(*u*) *Bincks* v. *South York & River Dun, &c.* 7 L. T., N. S. 350, Q. B.

free from dangerous shoals and obstructions, and to forbear from having the dock open for public use when they know it cannot be navigated or used without danger, whether the tolls are received by them for their own use or in a fiduciary character; and if they keep the dock open, and allow the danger to continue, and invite vessels into peril, they will be personally responsible for any damage that may be sustained (*x*).

Dangerous machinery.—If a corporation causes baths and washhouses, and wringing machinery, to be erected and used for hire, it is bound to take all reasonable care to prevent the machinery from being a source of danger to those who use it (*y*).

Injuries to servants from dangerous premises.—Every master who employs servants and workmen to work upon his land, house, or premises, is bound to take all reasonable precautions for their safety, and if hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*z*). If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed, but not if the servant accepted of the employment knowing of the risk he ran (ante, pp. 16, 141). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages (*a*). If a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected and unforeseen dangers, which they had no means of guarding against (*b*).

Exemption of the master from liability when the danger is known to the servant.—But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care. Where the plaintiff alleged that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defend-

(*x*) *Gibbs* v. *Trust. Liv. Dock*, 27 Law J., Exch. 321; 3 H. & N. 164, correcting *Metcalfe* v. *Hetherington*, 11 Exch. 257; 5 H. & N. 719. And see *Thompson* v. *North East. Rail. Co.* 2 B. & S. 106; 31 Law J., Q. B. 194; 30 ib. 67. *Mersey Docks, &c.* v. *Penhallow*, 7 H. & N. 329.

(*y*) *Cowley* v. *Mayor, &c. of Sunderland*, 6 H. & N. 565; 30 Law J., Exch. 127.

(*z*) *Williams* v. *Clough*, 3 H. & N. 258; 27 Law J., Exch. 325. *Mellors* v. *Shaw*, 1 B. & S. 444. *Ashworth* v. *Stanwix*, 30 Law J., Q. B. 183.

(*a*) *Potts* v. *Port Carlisle, &c. Co.* 2 Law T. R., N. S. 283; 8 W. R. 524.

(*b*) *Vose* v. *Lanc. & York. Rail. Co.* 2 H. & N. 728: 27 Law J., Exch. 249.

ant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant. "A person," observes Erle, J., "must make his own choice whether he will accept employment upon premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark, or carry a light. If he sustain an injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract (*c*).

Where the workman is employed in the use of dangerous machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care requisite to be taken to guard against accident, and, notwithstanding this, sustains injury from his own want of care and caution in the use of it, he has, of course, no ground of action against the employer (*d*). But if an act of parliament requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur (*e*).

Injuries to workmen from defective hoisting-tackle in mines, and insecure scaffolding and ladders.— It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition (*f*). And it is in all cases the master's duty to be careful that his workman is not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when he knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages (*g*). But if he does not in any way interfere himself, and employs a competent foreman to superintend the work, and select the materials, and the foreman selects unsound and

(*c*) *Seymour* v. *Maddox*, 16 Q. B. 332. *Bolch* v. *Smith*, 7 H. & N. 736; 31 Law J., Q. B. 201. *Robertson* v. *Adamson*, 24 Sc. Sess. Cass. 1231. *Potts* v. *Plunkett*, 9 Ir. C. L. R. 290.

(*d*) *Dynen* v. *Leach*, 26 Law J., Exch. 221. *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. 294.

(*e*) *Holmes* v. *Clarke*, 30 Law J., Exch. 135; 31 ib. 356. *Weems* v. *Mathieson*, 4 Macq. H. L. C. 215.

(*f*) *Brydon* v. *Stewart*, 2 Macq. 34.

(*g*) *Roberts* v. *Smith*, 26 Law J., Exch. 319; 2 H. & N. 213. *Senior* v. *Ward*, 28 Law J., Q. B. 139. *Mellors* v. *Shaw*, 1 B. & S. 444.

unsafe materials, which cause injury to the workmen working under the foreman's directions, the master is not responsible, as the default is not in him, but in the foreman and fellow-servant of the injured workman, and the case then ranges itself with that class of cases where it has been holden that the master is not responsible for injuries to one fellow-servant caused by the negligence of another fellow-servant in his employ (*h*).

Injuries to guests from the dangerous state of the premises of their host.— A man who invites and receives visitors at his house is under the same obligation and liability as regards them, in respect of unusual and unsuspected dangers on his premises, as he is towards his own servants and members of his family, and is not responsible for injuries arising from doors badly hung, and which are dangerous and unfit to be opened, unless he was himself aware of the dangerous state of the door, and the guest was wholly ignorant of it. If the dangers are patent and visible, the visitor who comes to, and is received within, the house, must share those dangers in common with the other members of the family (*i*).

Contributory negligence on the part of the plaintiff.—If the negligence of the plaintiff himself or of his servants has been the proximate cause of the injury of which he complains, he has no ground of action (*k*). If, therefore, the plaintiff does not take due and proper care to keep his cattle within bounds; if he or his servants leave gates open which they ought to have closed; or if he allows cattle to be driven across a railway by little boys who are unable or unlikely to exercise proper care and forethought, and in consequence thereof cattle stray on the line and get killed, he cannot recover compensation from the railway company for the loss (*l*). Where a railway crossed an occupation-way for horses and cattle, along which there was also a public footpath, and the company, not being aware of the public footpath, neglected to apply for the consent of justices for crossing the cattle-way on a level, but made their railway, and erected lofty gates on each side of the railway where it crossed the occupation-way, and gave keys of the gates to each of the adjoining occupiers who were entitled to use the occupation-road, and the plaintiff's servant, who was in the habit of driving the plaintiff's cows daily backwards and forwards across the line, received a key from the company, and lost it, and after that fastened the gate by thrusting a piece of wood through the staple, and the gate being left open, two colts of the plaintiff's strayed from his field along the occupation-way, through the open gate, upon the line of railway, and were killed by a passing train, it was held to be a

(*h*) *Wigmore* v. *Jay*, 5 Exch. 358; post, ch. 5. *Williams* v. *Clough*, 3 H. & N. 258; 27 Law J., Exch. 325. *Griffiths* v. *Gidlow*, ib. 404. *Farwell* v. *Boston, &c. Rail. Co.* 3, Macq. 316. *Ormond* v. *Holland*, Ell. Bl. & Ell. 105. *Scott* v. *Craig*, 24 Sc. Sess. Cas. 789. *Searle* v. *Lindsay*, 11 C. B., N. S. 429; 31 Law J., C. P. 106.

(*i*) *Southcote* v. *Stanley*, 1 H. & N. 247.

(*k*) Ante, pp. 16–18; post, ch. 10, s. 1.

(*l*) *Haigh* v. *Lond. & North-West. Rail. Co.* 8 W. R. 6.

question for the jury whether the negligence of the plaintiff had contributed to the accident; and they being of opinion that it had, it was held that the defendant was entitled to a verdict (*m*).

Where the plaintiff's right to recover is not defeated by his being a trespasser.—If the plaintiff has sustained injury from man-traps or spring-guns placed on the defendant's land, or from falling into an unfenced and unguarded pit or well sunk within twenty-five yards of any public carriage-way, it is no answer to the plaintiff's claim for damages to say that he was trespassing on the defendant's land, and that the injury was caused by his own misconduct (ante, pp. 142, 143). If the defendant has, by putting strong-smelling meats into traps on his land, tempted the plaintiff's dogs or cats to the traps to their destruction, it is no answer to say that the animals were trespassing on the defendant's land at the time they came to grief (ante, p. 140).

If the defendant makes a path to his house, and places unseen and unexpected dangers in or closely adjoining to the path, it is no answer to injured parties claiming compensation to say that they had no business to come upon the land (ante, pp. 141, 142). So, if the defendant negligently leaves a vault or area unfenced and unguarded, so close to a street or public highway as to be dangerous to passengers, it is no answer to a claim for damages by persons who have fallen into the vault whilst endeavouring to keep to the highroad, to show that there was a narrow intervening strip of the defendant's land extending between the highway and the area, on which the plaintiff was trespassing at the time he fell into the pit (*n*). But wherever a person designedly deviates from the highway, and commits a trespass, in order to make a short cut across the defendant's land, and in so doing falls into an open, unguarded vault or cellar, more than twenty-five yards distant from the highway, the defendant is not responsible for the injury (*o*). And whenever a person neglects to keep a proper watch upon his flocks and herds, and allows them to trespass on the highways and byeways and adjoining land, and the trespassing cattle get injured, the plaintiff, being himself in default, may have no remedy for the injury he sustains (*p*).

Nuisances and injuries from the keeping of ferocious animals.—Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is, *primâ facie*, liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mis-

(*m*) *Ellis* v. *Lond. & S. W. Rail. Co.* 2 H. & N. 429; 26 Law J., Exch. 349.

(*n*) *Barnes* v. *Ward*, 9 C. B. 392; 19 Law J., C. P. 195; ante, p. 143.

(*o*) *Hardcastle* v. *South York. &c. Ry. Co.* 4 H. & N. 74. *Stone* v. *Jackson*, 16 Q. B. 199; ante, p. 140.

(*p*) Ante, pp. 18, 150, 151.

chievous disposition (*q*). But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night, provided the barking of the dog does not disturb the rest of the neighbours and create a nuisance (ante, p. 138). And, therefore, where the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and was let loose at night, and the defendant's foreman inchautiously went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to an action for damages (*r*). But a man has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the day-time may be injured by it. And so with respect to a footpath, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it (*s*).

There is a difference between beasts that are *feræ naturæ*, as lions and tigers, which a man must always keep chained up at his peril, and beasts that are *mansuetæ naturæ*, and break through the ordinary tameness of their nature, such as oxen and horses. In the latter case, an action lies if the owner has had notice of the mischievous quality of the beast. In the former case, an action lies without such notice (*t*).

There is no distinction between the case of the keeping of an animal which breaks through the ordinary tameness of its nature, and becomes fierce, and is known by the owner to be so, and the keeping of one which is *feræ naturæ* (*u*). If a dog has once bitten a man without provocation, or under circumstances which would not excite any dog of good temper to bite, and the owner has notice of it, it is his duty to chain up or muzzle the dog; and if he lets him go about, or lie at the door unmuzzled, and another person is bitten under similar circumstances, the owner of the dog will be responsible for the injury (*x*). It is not material whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action. As soon as a dog is known to be mischievous, it is the duty of the person on whose premises the dog stands to send him away, or cause him to be destroyed (*y*). The same rule of law prevails with regard to a bull which is known to have run at a man, and to be therefore dangerous (*z*).

Effect of putting up a notice to beware of the dog.—The putting up a

(*q*) *May* v. *Burdett*, 9 Q. B. 110.
(*r*) *Brock* v. *Copeland*, 1 Esp. 203.
(*s*) Tindal, C. J., *Sarch* v. *Blackburn*, 4 C. & P. 300; M. & M. 505. *Curtis* v. *Mills*, 5 C. & P. 489.
(*t*) *Rex* v. *Huggins*, 2 Ld. Raym, 1583. *Jenkins* v. *Turner*, 1 ib. 110. *Mason* v. *Keeling*, ib. 608.
(*u*) *Jackson* v. *Smithson*, 15 M. & W. 565; 15 Law J., Exch. 311.
(*x*) *Charlwood* v. *Greig*, 3 C. & K. 48.
(*y*) *McKone* v. *Wood*, 5 C. & P. 2.
(*z*) *Blackman* v. *Simmons*, 3 C. & P. 138. *Clark* v. *Armstrong*, 24 Sc. Sess. Cas. 1315.

notice to beware of the dog will not exempt the owner of the dog from liability to a person injured, if it appears that the latter could not read, or did not in fact read, the notice. If the plaintiff was lawfully in a way leading to the house, and was, in point of fact, ignorant of the notice, and of the danger from the dog at the time he was bitten by it, he will be entitled to compensation in damages (*a*).

Dogs worrying sheep.—"If a man has a dog that kills sheep, the master of the dog, being ignorant of such quality, shall not be punished for this killing; but if he has notice of the quality of the dog, it is otherwise" (*b*). By 25 & 26 Vict. c. 59, s. 1, every owner of a dog in Ireland is made liable in damages for injury done to any sheep by his dog, and it is not necessary for the party seeking damages to show a previous mischievous propensity in the animal or the owner's knowledge thereof, or to prove any neglect on the part of the owner.

The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify a man in shooting him. To justify such a course, the animal must be actually attacking the shooter at the time he uses his gun (*c*).

Of the keeping dogs reputed to have been bitten by a mad dog.—If, by common report, a dog has been bitten by a mad dog, "it becomes the duty of the owner of the dog so reputed to have been bitten to be very circumspect" in the keeping of it. Whether the dog said to be mad was mad or not may be mere matter of suspicion, and yet it is not enough for a defendant to say, "I did use a certain precaution. He ought to put it out of the animal's power to do further mischief" (*d*).

Injuries from driving ferocious animals along a public thoroughfare.—Where the defendant's bull, which was being driven along the public streets, ran at a man with a red handkerchief round his neck and gored him, and the defendant, after the accident, was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to a jury to show that the defendant knew that his bull was a dangerous animal. "As the circumstance of persons carrying red handkerchiefs is not uncommon," observes Pollock, C. B., "and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing, as he did, the knowledge that if it met a person with a red garment, it was likely to run at and injure him" (*e*).

The following laws respecting the keeping of ferocious animals, ex-

(*a*) *Sarch* v. *Blackburn*, M. & M. 507: ante, p. 141.

(*b*) Vin. Abr. ACTIONS, H. pl. 3. *Fleeming* v. *Orr*, 2 Macq. H. L. C. 14; ante, p. 19.

(*c*) *Morris* v. *Nugent*, 7 C. & P. 572. *Clark* v. *Webster*, 1 C. & P. 104.

(*d*) Ld. Kenyon, *Jones* v. *Perry*, 1 Esp. 483.

(*e*) *Hudson* v. *Roberts*, 6 Exch. 699; 20 Law J., Exch. 299.

tracted from the Roman law, are not undeserving of attention. "If an ox has a trick of pushing with his horns, and wounds any one, or causes any other damage, the master who has neglected to shut up the ox, or to give such warning that people might avoid him, shall be answerable for the harm he does."

"Those who have horses or mules which kick or bite, must either warn people of their being vicious, or take care to have them well watched, otherwise they will be made liable for the damage they may do. If a dog, who has a trick of biting, is not tied up, or if he gets loose for want of being well looked after, and wounds any one, the master of the dog will be liable to make good the damage. But if a dog or other creature bites, or does any damage only because he has been provoked, he who has given occasion to the injury that has happened shall be accountable for it; and if he be the person who has sustained the injury, he is alone to blame. If the beast which has done the damage has been exasperated and stirred up by another beast, the master of the latter beast shall be accountable for the damage."

"Those who have wild beasts—such as lions, tigers, bears, and others of the like kind—ought to keep them so that they can do no harm, and they are answerable for all damage that arises from their not being safely and securely kept" (*f*).

SECTION II.

ABATEMENT OF NUISANCES—STATUTORY REMEDIES AND PENALTIES—ACTIONS—PROHIBITION—INJUNCTION AND INDICTMENT.

Abatement of nuisances.—By the Nuisances Removal Acts (18 & 19 Vict. c. 121; and 23 & 24 Vict. c. 77), various provisions are made for the abatement of nuisances affecting the public health. Sect. 8 of this act defines what are to be considered nuisances within its provisions, and the second part of the statute enables summary proceedings to be taken before magistrates, who are empowered to make orders for the abatement or prohibition of the nuisance (*g*). All persons having control over the soil on which a nuisance is suffered to exist, are liable to be proceeded against under this statute (*h*). Various statutory powers for the abatement of public nuisances are also given by the Salmon Fishery Act (*i*),

(*f*) Domat. liv. 2, tit. 8, s. 2.

(*g*) *Ex parte Mayor, &c. of Liverpool*, 4 Jur. N. S. 333. *Reg.* v. *Bateman*, 27 Law J., M. C. 95.

(*h*) *Draper* v. *Sperring*, 10 C. B., N. S. 113; 30 Law J., M. C. 225.

(*i*) 24 & 25 Vict. c. 109. *Williams* v. *Blackwall*, 32 Law J., Exch. 174.

the Smoke Prevention Act (16 & 17 Vict. c. 128), the Public Health and Local Government Act (21 & 22 Vict. c. 98; 23 & 24 Vict. c. 77), and by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 69–81, which provides for the shoring up and removal of dangerous structures situate in the metropolis and its neighbourhood (*k*). The expense incurred in the removal of nuisances under many of these local acts is recoverable in the county court (*l*).

A man cannot, at the common law, enter upon his neighbour's land, to prevent the commission of an apprehended nuisance, but he may justify a peaceable entry for the purpose of abating and putting a stop to an existing nuisance. Thus, where the plaintiff had set up poles on his own land, in order to build a house which, when erected, would be a nuisance to the adjoining dwelling-house of the defendant, and the latter entered upon the plaintiff's land and prostrated the poles, to prevent the nuisance, it was held that the entry was wholly unjustifiable (*m*). But if H builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may, after previous notice and request to remove the building, enter upon the owner's soil and pull it down, provided the whole house is a nuisance. If part only of the house obstructs my lights and creates a nuisance, I am not justified in pulling down the whole building (*n*).

Before an entry is made upon the land of another for the purpose of abating a nuisance, notice should be given to the occupier of the land of the existence of the nuisance, and he should be required to abate it himself (*o*); and the plea justifying the entry should contain an averment that notice was given to the plaintiff to abate the nuisance, and that he neglected or refused to do it, whereupon the defendant entered upon the plaintiff's land and abated it himself, using no more violence than was necessary for the purpose (*p*).

Where there is any immediate danger to life from the continuance of the nuisance, so as to render it unsafe to wait for its removal by the occupier, the injured party may at once enter and remove it; but the facts establishing the necessity should be set forth in the special plea.

A distinction has been taken between nuisances of commission and omission; and it is said that if the plaintiff was the original wrong-doer, and himself created the nuisance, it may be abated without notice; but if the nuisance was levied by another, and the defendant succeeded to the

(*k*) *Reg.* v. *Harden*, 2 Ell. & Bl. 191; post, ch. 21.

(*l*) As to proof of the ownership of the premises, *Blything Un.* v. *Warton*, 32 Law J., M. C. 132.

(*m*) *Norris* v. *Baker*, 1 Roll. Rep. 393. pl. 15.

(*n*) *Rex* v. *Rosewell*, 2 Salk. 459.

(*o*) *Perry* v. *Fitzhowe*, 8 Q. B. 776. *Jones* v. *Jones*, 1 H. & C. 1; 31 Law J., Exch. 506.

(*p*) *Davies* v. *Williams*, 16 Q. B. 550; qualifying *Perry* v. *Fitzhowe*, 8 Q. B. 757.

possession of the *locus in quo* afterwards, then notice to remove it must be given and averred in the plea, in order to make out a justification (*q*). "There is no decided case," observes Best, J., "which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The security of lives and property may, however, sometimes require so speedy a remedy, as not to allow time to call on the persons on whose property the mischief has arisen to remedy it; and, in such cases, an individual would be justified in abating a nuisance from an omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice" (*r*).

Abatement of nuisances upon commons.—Where an encroachment had been made on a common, and a house built which obstructed the exercise of the right of common, it was held that the commoner might, after notice and request to the wrong-doer to remove the house, pull it down, though the latter was at the time actually present in the house with his family (*s*). The commoner has a right to pull down and remove a hedge, a gate, or a wall, which obstructs or abridges the exercise of his right (*t*); but he cannot destroy beasts of warren, such as hares or rabbits, although they have increased to such an extent as to destroy all the herbage (*u*).

Removal of ruinous buildings.—The Metropolitan Building Act provides, as we have seen, for the removal or reparation of structures, certified by their surveyor to be in a dangerous state, and enables the commissioners of the police, in certain contingencies, to pull down and remove such structures, and charge the expenses incurred in so doing upon the owner of the property, without prejudice to his right, to recover the same from the lessee, or other person liable to repair. S. 3 of this statute provides that the word "owner" shall apply to every person in possession or receipt of the whole or any part of the rents or profits, or in the occupation of the tenement other than as tenant from year to year, or for any less term; or as tenant at will, so that, if tenant for term of years has sublet from year to year, and receives rent from his sub-lessee, he is the statutable owner, and upon him the order for expenses must be made. If the occupier be a lessee for a longer term than from year to year, he is then the statutable owner (*v*).

Abatement of nuisances arising from the exercise in excess of limited rights.

(*q*) *Jones* v. *Williams*, 11 M. & W. 176.

(*r*) *Lonsdale* v. *Nelson*, 2 B. & C. 311.

(*s*) *Davies* v. *Williams*, 16 Q. B. 546; 20 Law J., Q. B. 330. But see *Jones* v. *Jones*, ut sup.

(*t*) *Mason* v. *Cæsar*, 2 Mod. 66.

(*u*) *Cooper* v. *Marshall*, ante, p. 89.

(*v*) *Mourilyan* v. *Labalmondiere*, Ell. & Ell. 533; 30 Law J., M. C. 95. *Labalmondiere* v. *Frost*, Ell. & Ell. 527; v. *Addison*, 1 Ell. & Ell. 41; 28 Law J., M. C. 225.

—Where a party who is entitled to a limited right exercises it in excess, so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits. "Thus if a man," observes Alderson, B., "has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty." So, if a man has a limited right to the use of a window, and he enlarges the window considerably, the person annoyed by the enlargement of the window may, by erecting a screen or barrier on his own land, stop up the whole of it. The party who is in that way prevented from the exercise of a limited right, because he has turned it into a larger claim, has no other resource than to reduce his window to its ancient size, and then insist on his right to have it tolerated (*w*).

If a landlord has been content to allow the public a limited right of way over his lands, and across a brook by a certain number of stepping-stones, the Commissioners of Highways have no right to widen the footpath or the stepping-stones, or do anything to increase the public accommodation, or enlarge the right of passage, without the consent of the landowner. If, therefore, the surveyor makes a bridge over a stream, in lieu of stepping-stones, or places flag-stones on the stepping-stones, the landowner has a right to remove them (*x*).

Removal of obstructions in public thoroughfares.—A private individual cannot, of his own authority, abate an obstruction in a public highway, unless it does him a special injury; and he can only interfere with it as far as is necessary to enable him to exercise his right of passing along the highway. He cannot, therefore, justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience (*y*). To justify a private individual in pulling down a wall or destroying a fence, on the ground of its being an obstruction in a public highway, it must be shown, not only that the wall or fence encroached upon the public thoroughfare, but that the defendant was unable to enjoy his right of passing along the road without the removal of the obstruction (*z*). The placing of a gate across a public carriage road, where no gate existed before, is, as we have seen, a nuisance, so that any one having occasion to pass along the thoroughfare, may cut down and destroy the gate (*a*).

Removal of obstructions to the navigation of navigable rivers.—To justify

(*w*) *Cawkwell* v. *Russel*, 26 Law J., Exch. 34. As to this see ante, p. 112.

(*x*) *Sutcliffe* v. *Surveyors, &c. Sowerby*, 35 Law T. R., Q. B. 7.

(*y*) *Dimes* v. *Petley*, 15 Q. B. 283. *Davies* v. *Mann*, 10 M. & W. 546. *Mayor of Colchester* v. *Brook*, 7 Q. B. 377.

(*z*) *Bateman* v. *Bluck*, 18 Q. B. 876; 21 Law J., Q. B. 406.

(*a*) *James* v. *Hayward*, ante, p. 144.

a private individual in breaking down a weir or sluice, or removing an obstruction in the channel of a navigable river, it must be shown that the obstruction was of such a nature as to prevent him from passing up and down the river. If there were sufficient space left for him to pass with reasonable safety, he cannot justify the removal of the obstruction (*b*). The 4th statute 25 Ed. 3, c. 4, reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the setting up of gorces, mills, weirs, stanks, stakes, and kiddles, provides for the utter destruction of all such as have been levied and set up in the time of Edward I. and after. It directs writs to be sent to the sheriffs, to survey, and inquire, and do execution thereof. The effect of this statute appears to be to legalize weirs which can be shown to have been erected prior to the time of Edward I. although, from changes in the bed of the river, they may have the effect of totally preventing the navigation of the stream (*c*).

Penalties have been imposed by statute upon all persons having charge of vessels who shall throw any ballast, gravel, earth, rubbish, or filth, into any navigable river, so as to tend to the injury or obstruction thereof; and the person having charge of the vessel will be responsible for the acts of the crew, and may be convicted of the offence and fined, though he was not on board at the time it was committed (*d*).

Pulling down ruinous houses adjoining a public thoroughfare.—The Metropolitan Building Act (7 & 8 Vict. c. 84, s. 40) authorizes the pulling down of ruinous buildings under certain circumstances and contingencies, and provides (ss. 41, 42) for payment of the expenses by the owner, being the person entitled to the immediate possession thereof (*e*), and also by the occupier.

Statutory remedies and penalties in respect of nuisances from gas-works.—By the statute 10 & 11 Vict. c. 15, for comprising in one general act sundry provisions to be contained in acts of parliament thereafter passed, authorizing the construction of gas-works for supplying towns with gas, penalties are imposed (s. 11) upon parties authorized by statute to construct gas-works, for delays in making good broken ground, and reinstating roads broken up by them, and removing rubbish; and, in case of delay, the persons having the control or management of the street, &c., may do what is necessary to be done, and recover their expenses from the persons authorized to construct the gas-works. A penalty of 200*l.* is also imposed (s. 21) upon such parties, and upon gas companies, for corrupting streams, ponds, and drains with the refuse or filth of gas-works. It is

(*b*) Ante, p. 146. *East Co. Rail. Co.* v. *Dorling*, 5 C. B., N. S. 821; 28 Law C., P. 202.

(*c*) *Williams* v. *Wilcox*, 8 Ad. & E. 329. As to the recent act, see ante, p 45.

(*d*) *Michel* v. *Brown*, 28 Law J., M. C. 53; 54 Geo. 3, c. 159, s. 11.

(*e*) *Overseers of Saffron Hill* (*ex parte*), 24 Law J., M. C. 56.

recoverable for each offence, with full costs of suit in any of the superior courts (s. 22) by the person whose water has been fouled by the gas-washings or refuse, provided the action is brought during the continuance of the offence, or within six months after it shall have ceased. In addition to this penalty of 200*l.*, a sum of 20*l.*, to be recovered in like manner, is to be paid for each day during which gas-washing or refuse is allowed to flow into and foul the water, after the expiration of twenty-four hours from the time when notice of the offence (s. 23) shall have been served by the person whose water has been fouled; and such penalty is to be paid to the latter. And whenever any water within the limits of the special act is fouled by the gas, a sum of 20*l.* is forfeited for every such offence (s. 25), and 10*l.* a-day for every day during which the offence shall continue, after twenty-four hours' notice of the offence. The object of the legislature appears to have been to make the company insurers, at all events, against any contamination of the water in the neighbourhood by the access to it of the residuum of their gas-works (*f*). By s. 29 of this statute, it is enacted that nothing in this or the special act contained shall prevent the undertakers (the persons authorized to construct the gas-works and make gas) from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas. The ordinary remedy by action for damages, therefore, is maintainable for a nuisance arising from gas-works, notwithstanding the existence of the penal clauses in this statute (*g*).

Penalties for fouling water in any well, fountain, or pump, are imposed by 23 & 24 Vict. c. 77, s. 8.

Penalties for the nonconsumption of smoke are imposed by divers acts of parliament upon manufacturers and proprietors of steam-boats (*h*) and railway companies (*i*).

By-laws for the suppression of nuisances made by town councils of boroughs under s. 90, of the Municipal Corporation Act, must, as we have seen, be confined to the suppression of such acts as are nuisances in themselves, and cannot be extended to an act which may, or may not be a nuisance according to circumstances (*k*).

Actions for nuisances—Private injuries from a public nuisance.—Wherever a special or particular damage is sustained by a private individual from a public nuisance, an action for damages is maintainable (*l*). It has been held that the prevention of customers from coming to a colliery by

(*f*) *Hipkins* v. *Birm. &c. Gas Light Co.*, 6 H. & N. 250; 30 Law J., Exch. 60, 29; ib. 169.

(*g*) Willes, J., *Broadbent* v. *Imp. Gas Light Co.*, 26 Law J., Ch. 280.

(*h*) 16 & 17 Vict. c. 128; 19 & 20 Vict. c. 107. *Walker* v. *Evans*, 29 Law J., M. C. 22.

(*i*) *Manchester Sheff. &c. Rail. Co.* v. *Wood*, 29 Law J., M. C. 29. As to the recovery of penalties before justices, *Reg.* v. *Jenkins*, 9 Jur. N. S. 571.

(*k*) *Everett* v. *Grapes*, ante, p. 32.

(*l*) *Soltau* v. *De Held*, 2 Sim. N. S. 145; 21 Law J., Ch. 159.

obstructing a public highway, *per quod* the benefit of the colliery was lost, and the coals dug up depreciated in value, was such a special and particular damage as would enable the owner of the colliery to maintain an action for the private injury resulting from the public nuisance (*m*).

In an action for damages from the unlawful obstruction of a public thoroughfare, the plaintiff proved that he carried on business as a bookseller in a shop abutting upon the obstructed thoroughfare, and that his customers consisted almost entirely of persons who had been in the habit of using the thoroughfare, and that his business had materially declined in consequence of the obstruction, it was held that the injury thus sustained by the plaintiff was such as to entitle him to maintain an action for damages, notwithstanding there might be many individuals on the same line of thoroughfare similarly damnified by the act of which he complained (*n*). And where the plaintiff, in an action for damages from an obstruction in a public navigable tidal river, declared that he carried on the business of an innkeeper in a house abutting upon the river, and that the defendant placed beams and spars in the water which floated backwards and forwards with the tide, and obstructed the access to the house at certain periods, whereby the plaintiff's customers were prevented from coming to his house to take refreshments, it was held that this was a specific particular damage resulting to the plaintiff from the public nuisance, which entitled him to an action for damages (*o*).

Where the plaintiff was navigating a public navigable river with his barges laden with goods, and the barges were impeded in their progress by a vessel which the defendant had wrongfully moored across the stream, and the plaintiff, in consequence of the obstruction, was compelled to unload his barges and carry his goods by land to their place of destination, it was held that the plaintiff was entitled to recover from the defendant all the expenses of the land-carriage of the merchandize (*p*).

No one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to the public (*q*).

When a notice to abate or discontinue a nuisance should be given before commencing an action.— If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action. But if the action is brought against the mere continuer of a pre-existing nuisance, a request to remove the nuisance must be made before the action is commenced (*r*).

(*m*) *Iveson* v. *Moore*, 1 Ld. Raym. 486; 1 Salk. 15; Carth. 451. *Green* v. *Lond. Gen. Omnib. Co.*, ante, p. 145.

(*n*) *Wilkes* v. *Hun. Market Co.*, 2 Sc. 446; 2 Bing. N. C. 281.

(*o*) *Rose* v. *Groves*, 6 Sc. N. R. 653; 5 M. & Gr. 613.

(*p*) *Rose* v. *Miles*, 4 M. & S. 101.

(*q*) *Chichester* v. *Lethbridge*, Willes, 73.

(*r*) *Penruddock's* case, 5 Co., 100 b. *Winsmore* v. *Greenbank*, Willes, 583.

A notice to abate or remove a nuisance, delivered at the premises to which it relates to the occupier for the time being, will bind a subsequent occupier (*s*).

If a man commits a nuisance, and afterwards does away with it, and with all the effects of it, before action brought, the cause of action is extinguished (*t*); but the abatement of the nuisance is no defence in point of law against a complaint for an antecedent injury. If damage has been sustained the defendant is not the less bound to compensate for that, because he has promptly and properly repaired his fault (*u*).

Continuing nuisances.—The continuance of the nuisance is a fresh injury, for which another action may be brought, and so, *toties quoties*, until the obstruction is removed (*x*), or the wrongful act done away with (*y*). Parties may be liable for the continuance of a nuisance which they themselves originally created, although they are not in possession of, or interested in, the soil on which the nuisance exists; and they have no right to enter thereon for the purpose of abating the nuisance (*z*).

Parties to be made plaintiffs.—The actual occupier of lands and buildings incommoded and prejudiced by a nuisance is, in general, the proper party to maintain an action for damages. If the injured property is in the occupation of tenants to whom it has been demised, the landlord or reversioner has no right of action, unless the nuisance is of a permanent character, and necessarily inflicts a lasting injury upon the inheritance. It has been holden, for example, that the reversioner is not entitled to maintain an action for damages arising from the erection of a noisy workshop, or a furnace and smoky chimney, in close contiguity to dwelling-houses in the occupation of his tenants, although the noise and the smoke render the houses uninhabitable, and the tenants give notice to leave; for the occupiers of the workshop and the furnace may be compelled, by proceedings on the part of the tenants, to discontinue the nuisance. "The action," observes Bramwell, B., "should be brought by the tenant. It is said that the noises diminished the value of the premises. I do not agree to that. If the tenant is damaged by them to the value of 10*l.* he will get 10*l.* compensation." "In order to give a right of action to the reversioner," further observes Pollock, C. B., "the injury must be of a permanent nature. Here the hammering and noises may be stopped and the nuisance removed at any time" (*a*). If, however, the tenant actually leaves the premises, and the reversioner comes into possession, then an immediate injury accrues to him, in respect of which he has an immediate right of action.

(*s*) *Salmon* v. *Bensley*, R. & M. 189.
(*t*) Bro. Abr., pl. 2.
(*u*) *Bell* v. *Twentyman*, 1 Q. B. 774.
(*x*) *Shadwell* v. *Hutchinson*, 4 C. & P. 333.
(*y*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 Law J., C. P. 305.
(*z*) *Thompson* v. *Gibson*, 7 M. & W. 460.
(*a*) *Mumford* v. *Oxfd. Worc. & Wolv. Rail. Co.*, 1 H. & N. 35. *Simpson* v. *Savage*, 1 C. B., N. S. 347; 26 Law J., C. P. 50.

Where, on the other hand, a building was erected, the roof and eaves of which overhung the plaintiff's land, and discharged rain-water thereon, and the plaintiff brought his action for an injury to his reversion, the land being in the occupation of his tenants, it was held that he was entitled to recover, as the very existence of the building was a nuisance and permanent injury to the property, and would, if allowed to continue, impose a servitude thereon (*b*).

When several persons have a joint interest in property injured by a nuisance, they ought all to be made plaintiffs in an action for the injury. Tenants in common, also, should join in an action for a nuisance done to their land (*c*).

Parties to be made defendants.— We have seen that the occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord, if the nuisance existed at the time he demised them (*d*). Every person who does, or directs the doing, of an act which cannot be done at all without constituting and creating a nuisance, is personally responsible, whether he was acting for himself, or for or on behalf, or for the benefit, of another, and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master (*e*). But a steward, manager, or agent, who merely hires labourers for his master, and takes no part in the immediate creation of the nuisance, is not answerable for the nuisance (*f*). If the landlord of a house, under a contract with his tenant to whom he has demised the house, employs workmen to repair the house, the landlord is responsible for a nuisance in the house occasioned by the negligence of his own workmen, although the repairs are done at the instance and for the benefit of the tenant, and are, when executed, to be paid for by him (*g*).

When a defendant is sought to be made responsible for a nuisance, not on the ground of his being the owner or the occupier of the land or premises on which the nuisance exists, but because he has ordered or directed the doing of an act in a public thoroughfare, or a navigable river, or on the land of the plaintiff himself, which has created a nuisance, it must be shown that the relationship of master and servant exists between the defendant and the workmen who have personally done the act complained of, or that the workmen were acting under his immediate control and directions. If the execution of repairs to a dwelling-house, or the construction of a drain, is entrusted to a builder or contractor, who exercises an independent employment, and selects his own servants and workmen, and has the immediate control and superintendence of the work,

(*b*) *Tucker* v. *Newman*, 11 Ad. & E. 40.

(*c*) Bac. Abr., JOINT TENANTS, &c. K.; ante, p. 54; post, ch. 20.

(*d*) Ante, pp. 134, 135. *Bishop* v. *Trust. Bed. Charity*, 1 Ell. & Ell. 697; 28 Law J., Q. B. 215.

(*e*) *Wilson* v. *Peto*, 6 Moore, 49. *Witte* v. *Hague*, 2 D. & R. 33.

(*f*) *Stone* v. *Cartwright*, 6 T. R. 412.

(*g*) *Leslie* v. *Pounds*, 4 Taunt. 648.

the owner of the house, who employs the contractor, is not responsible for the creation of nuisances in the public thoroughfare, by the negligence of the contractor's servants, if he was ignorant of their unlawful proceedings, and had no knowledge of the probable consequences of their acts (*h*).

If any excavations or constructions of any kind, are authorized to be made, over or across a public thoroughfare, by private individuals or a public company, or by commissioners, and the works are lawful in themselves, and can be done without injury to individuals, and without creating any nuisance, and the parties directing the works to be executed employ a contractor to do the work, who selects the workmen, and has the entire conduct and management of the work, the parties so employing the contractor, and authorizing the execution of the works, are not themselves responsible for nuisances or injuries arising from the incompetence of the contractor, or the negligent execution of the works by him, his servants, or agents, or for damage from things done by the contractor or his workmen, which were never authorized or ordered to be done by the company or commissioners (*i*).

Where certain commissioners, appointed under an act of parliament for the improvement of the navigation of a canal, agreed with a contractor for the performance of certain works for drainage and carrying off the surplus waters of the canal, and the contractor, in the exercise of the powers conferred on the commissioners by the legislature, constructed a drain through the land of the plaintiff for the purpose of carrying off the waste water, and the plaintiff's land was flooded in consequence of the defective and negligent construction of the drain, it was held that the contractor, and not the commissioners, was responsible for the nuisance, as the contractor was not the servant of the company, but occupied an independent position, having the selection and entire control of the workmen, and sole management of the works (*k*).

In this case the defective drain, causing the overflow of the water and creating the nuisance, was on the plaintiff's own land. Had the nuisance arisen upon the land of the defendants, they would have been responsible for it (ante, pp. 134, 135). Where the defendants have employed a contractor to do an act which is unlawful in itself, or which cannot be done without creating a nuisance, then the act done by the contractor is in substance their act, and they are responsible for the consequences which naturally result from it (*l*).

(*h*) *Peachey* v. *Rowland*, 13 C. B. 185.

(*i*) *Gray* v. *Pullen*, 32 Law J., Q. B. 169. *Knight* v. *Fox*, 5 Exch. 725; 20 Law J., Exch. 9. *Overton* v. *Freeman*, 11 C. B. 867; 21 Law J., C. P. 52. *Peachey* v. *Rowland*, 13 C. B. 182; 22 Law J., C. P. 81, qualifying *Bush* v. *Steinham*, 1 B. & P. 404. And see post, ch. 8, s. 2, CONTRACTOR AND SUB-CONTRACTOR.

(*k*) *Allen* v. *Hayward*, 7 Q. B. 960; 15 Law J., Q. B. 99.

(*l*) *Ellis* v. *Sheff. Gas Co.*, 2 Ell. & Bl. 767; 23 Law J., Q. B. 42. *Hole* v. *Sittingbourne, &c. Rail. Co.*, 6 H. & N. 500. *Blake* v. *Thirst*, 32 Law J., Exch. 188. And see post, ch. 8, s. 2; ch. 21.

The action may be brought against all the persons doing, or ordering the doing, of the wrongful act, as well as against the occupier of the land on which the nuisance exists; but, instead of bringing his action against all jointly, the plaintiff may, as we have seen, sue one or more of them at his election (*m*).

Declarations for nuisances.—If the plaintiff complains of smoke or noisome smells and exhalations, or noises emanating from the defendant's land, the declaration should set forth the plaintiff's possession of certain tenements adjoining other tenements in the occupation of the defendant, and the creation and continuance by the defendant of the nuisance on the land and tenements in his occupation, setting forth the nature of the nuisance, and alleging that the plaintiff was thereby disturbed and annoyed in the occupation and enjoyment of his property, and the property itself was deteriorated in value. If the plaintiff has been impeded in the exercise of his trade or profession, or any special damage has been sustained, it should be stated as a consequence of the wrong done, and the declaration should conclude with a claim of a specific sum for damages (*n*).

If the injury of which the plaintiff complains arises from the fall of chimneys from the defendant's premises upon the plaintiff's house, or from filth and rubbish being allowed to run down from the defendant's premises upon the plaintiff's land, the plaintiff may declare for a trespass upon his land, alleging that the defendant cast thereon large quantities of stones, bricks, and rubbish, night-soil, filth, or manure, as the case may be (*o*), and flooded the plaintiff's premises, and disturbed him in the occupation and enjoyment of his dwelling-house, or he may declare for the consequential injury arising from acts of commission or omission by the defendant on his own land. We have seen that the duty of cleansing and repairing drains used by the occupier of a house devolves upon such occupier, and not upon the landlord. A declaration, therefore, which merely alleges that the defendant is the owner and proprietor of the drains or the houses, and seeks to cast upon him, as such owner, a legal obligation to make good the damage ensuing to his neighbour from their foul or dangerous condition, is bad on general demurrer, unless it shows some special ground for making the defendant liable as owner (*p*).

Where the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant, "debuit et solebat reparare," and that, for want of repair, the filth of the privy ran into the cellar, it was moved, in arrest of judgment, that this being a charge laid upon the occupier of

(*m*) Ante, pp. 54, 122; post, ch. 20.
(*n*) Ante, pp. 58, 129; post, ch. 21.
(*o*) *Gregory* v. *Piper*, 9 B. & C. 591. *Tenant* v. *Golding*, 1 Salk. 21. *Pickering* v. *Rudd*, 1 Stark. 58.
(*p*) *Russell* v. *Shenton*, 3 Q. B. 457. *Chauntler* v. *Robinson*, 4 Exch. 169.

the adjoining land, the plaintiff should have showed a title by prescription to have the wall kept in repair for his benefit, "sed non allocatur;" for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it. "Sic utere tuo ut alienum non lædas" (*q*).

A declaration setting forth the plaintiff's possession of a messuage and land, and the defendant's possession of an adjoining brew-house, and that the defendant caused water to be conveyed from a certain spring through leaden pipes placed near the foundations of the plaintiff's house and took so little care of the pipes, or so negligently used and managed them, that the water escaped from the pipes, and flooded the plaintiff's house, and injured the foundations thereof, and caused the walls of the house to crack and give way, &c., discloses a good cause of action (*r*).

When the plaintiff complains of the pollution of a stream, he should show that he was in the actual enjoyment of pure water, or that, by reason of his possession of a messuage or land, he had a right to the flow of a stream of water through his premises in its natural purity (ante, pp. 55, 123, 124), and that the defendant polluted it. If the injury has resulted from negligence on the part of the defendant, in not having properly fenced or guarded a hole or cellar, or dangerous excavation on his premises, the declaration should show that the defendant was the occupier of the cellar and premises; that the cellar closely adjoined a public footway, and opened thereon, so as to be dangerous to persons passing along it, or that the hole or excavation was within twenty-five yards of a public highway; and that the defendant wrongfully suffered the hole to remain unfenced and unguarded; and that the plaintiff, whilst he was passing along the highway, or along the open unenclosed land adjoining the highway, and within twenty-five yards thereof, fell into the hole and was injured, and prevented from attending to his business, and was obliged to expend money in surgical attendance and advice (*s*).

It is not necessary to state in the declaration that it was the duty of the defendant to do the act which he is alleged to have neglected to do, but the facts creating the obligation to perform the duty should be set forth. The allegation of duty is useless where the declaration is insufficient, and superfluous where it is sufficient (*t*).

A declaration alleging that the defendant was a proprietor of a building called, &c., used by the defendant for purposes of gain, that the

(*q*) *Tenant* v. *Golding*, 1 Salk. 21. *Hodgkinson* v. *Ennor*, 32 Law J., Q. B.; 8 L. T. R., N. S. 451.

(*r*) *Hoare* v. *Dickinson*, 2 Ld. Raym. 1569.

(*s*) *Bishop* v. *Trustees Bedfd. Charity*, ante, p. 140.

(*t*) *Metcalfe* v. *Hetherington*, 11 Exch. 270. *Seymour* v. *Maddox*, 16 Q. B. 331. *Southcote* v. *Stanley*, 1 H. & N. 247; 25 Law J., Exch. 247. *Gibbs* v. *Trust. Liv. Dock*, 3 H. & N. 164.

plaintiff entered and paid for his admission, and that the defendant, not regarding his duty in that behalf, did not carefully and skilfully, and with proper strength and materials, construct and maintain the building and the staircase thereof, so as to be, for the purposes aforesaid, safely and securely used, and that, by reason thereof, whilst the plaintiff was in the building, the staircase fell, and the plaintiff was violently thrown down and injured, discloses a good cause of action (*u*).

If the grantor of a private way is bound, by express stipulation or prescription, to repair it, it is sufficient, in an action against him for neglecting to do so, to allege generally in the declaration that he, by reason of his possession of the close in which the way is, ought to repair it, and the special matter of the obligation may be given in evidence (*x*).

When the plaintiff complains of an injury to his reversionary estate, the declaration should allege that, at the time of the committing the grievance of which he complains, certain messuages, tenements, and land, with the appurtenances, were in the occupation of certain persons, as tenants thereof to the plaintiff, the respective reversions in the said messuages, &c. being in the plaintiff, and that the plaintiff and his tenants, by reason of their interest in, and possession of, the said messuages or tenements, and land, of right ought to enjoy the use of the water of a certain well and pump, and that the defendant erected a cesspool so near the well and pump that the water therein was contaminated and rendered useless by the oozing out of the soil and filth from the cesspool (*y*).

Declarations for injuries from the keeping of ferocious animals.—In actions for injuries from keeping ferocious animals, the plaintiff must set forth in his declaration the mischievous propensity of the animal, the keeping of it by the defendant, with knowledge of such propensity, and the injury to the plaintiff; but the plaintiff need not tie himself down to any allegation of the particular habits of the animal, and of the defendant's knowledge of those habits. He may allege, generally, that the animal was of a ferocious nature, and unsafe to be left at large, and that the defendant knew it, and that he nevertheless permitted the animal to be at large (*z*). It is usual, however, to allege that the animal was of a ferocious disposition, and accustomed to attack or bite mankind, or sheep and animals, the subject of private property (*a*).

It is not necessary to allege or prove any negligence or want of care in the keeping of the animal by the defendant (*b*). The injurious con-

(*u*) *Brazier* v. *Polytechnic Institution*, Q. B. 1859.

(*x*) *Rider* v. *Smith*, 3 T. R. 766.

(*y*) *Metrop. Assoc.* v. *Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 330.

(*z*) *Hartley* v. *Harriman*, 1 B. & Ald. 624.

(*a*) *Jenkins* v. *Turner*, 2 Salk. 661.

(*b*) *May* v. *Burdett*, 9 Q. B. 111; 16 Law J., Q. B. 64.

sequences to the plaintiff should be stated; and if any special damage has been sustained, it should be set forth on the face of the declaration.

Plea of not guilty. — In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house (*c*). In an action for forming a cesspool near a well, and thereby contaminating the water of the well, it was held that the plea of not guilty put in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated (*d*). In actions for injuries from acts of omission, the fact that the injury was occasioned by negligence and misconduct on the part of the plaintiff, as well as by neglect of duty on the part of the defendant, is also admissible under the plea of not guilty (*e*). In actions for injuries resulting from the keeping of ferocious animals, with knowledge of their dangerous propensity, the plea of not guilty puts in issue both the fact of the ferocity of the animal and the defendant's knowledge of it; those two matters forming the substance of the wrongful act (*f*).

Pleas justifying the fouling of the water of a stream under a prescriptive right to discharge into it the refuse of dye-houses and manufactories, and the washings of mines.—When the plaintiff complains of the fouling and sending rubbish down a natural stream of water running through the plaintiff's land, it is a good defence to plead that the defendant, at the time of the committing of the alleged injury, was the occupier of land, and of a tin-mine situate thereon, and abutting upon the stream, and that the defendant and all other occupiers for the time being of the land and tin-mine, for the period of twenty years next before the commencement of the action, enjoyed as of right and without interruption (*g*) the privilege of using the water of the stream for the purpose of working the tin-mine, and mining and washing tin-ore, and of fouling the water of the stream with sandstones and rubble and the washings of the tin-mine; and that the defendant, being the occupier of the land and tin-mine, did, in working the mine, and mining and washing the tin-ore, necessarily discharge into the stream sandstones and rubble, and did necessary foul the water of the stream, and obstruct the channel and bed thereof (*h*). A plea of this sort sets up a prescriptive right to the use of the water of the stream for the necessary working of the mine; but it is doubtful whether a plea which merely alleges a user as of right to throw cinders, scoriæ, coal-dust,

(*c*) Reg. Gen. 16 Vict. 1 Ell. & Bl., App. lxxxi.

(*d*) *Norton* v. *Scholefield*, 9 M. & W. 665.

(*e*) *Holden* v. *Liv. Gas Co.* 3, C. B. 1.

(*f*) *Card* v. *Case*, 5 C. B. 622.

(*g*) Ante, pp. 97–109.

(*h*) *Carlyon* v. *Lovering*, 1 H. & N. 789; 26 Law J., Exch. 251.

and the refuse of the ash-pit of a steam-engine into a running stream, so as to obstruct the channel and bed thereof, is a good plea, as it does not appear to set up a claim which might lawfully be made at the common law by custom, prescription, or grant to an easement or watercourse, or use of water within the meaning of the Prescription Act (*i*).

Pleas justifying the poisoning of the atmosphere with noxious smells and exhalations under a prescriptive right to carry on an offensive trade, should set forth that the defendant and his predecessors, occupiers for the time being of the house, and premises, and ground in the declaration mentioned, exercised and enjoyed for the full period of twenty years next before the commencement of the action, as of right and without interruption, the trade of, &c., in and upon the said premises, and thereby, during all that time, divers noisome smells unavoidably arose from the said premises, and extended themselves to the plaintiff's land, and created smells thereon, and that the grievance complained of by the plaintiff was a user by the defendant of his premises for the purposes of such trade (*k*).

Evidence at the trial—Proof on the part of the plaintiff should be directed to the establishment of all the material allegations in the declaration in the order in which they are set forth, *i.e.* the plaintiff's possession of a certain tenement adjoining another tenement in the occupation of the defendant, and the existence of a nuisance on the last-named tenement. When the plaintiff sues for a temporary nuisance (ante, pp. 134, 168), he must show that he is the actual occupier of the property injured by the nuisance. When he sues as the landlord or reversioner of the property injured, he must prove that the nuisance was of a permanent character, damaging the marketable value of the property (ante, pp. 54, 58, 121). The nature and character of the nuisance will have to be proved (ante, pp. 134–161); and it must be shown either that it disturbed and annoyed the plaintiff in the occupation and enjoyment of the property, or that the property was deteriorated in value (ante, p. 54).

In order to make the defendant responsible for the nuisance, it must be proved, either that he was the actual occupier of the land or tenement on which the nuisance existed, or that he had authorized or directed the doing of the thing which created the nuisance. Proof of the exercise of acts of ownership over the tenement on which the nuisance exists, such as paying the wages of workmen employed there (*l*), locking the doors, or chaining the gates at night, or giving orders that it should be done, posting bills in the windows, or paying a woman to open the shutters and air the house, will be sufficient *primâ facie* evidence of actual or constructive occupation; and any declarations or admissions by the defendant

(*i*) *Murgatroyd* v. *Robinson*, 2 Ell. & Bl. 391; 26 Law J., Q. B. 233.
(*k*) *Flight* v. *Thomas*, 10 Ad. & E. 590. 1 Smith's L. C. 217. *Cooper* v. *Hubbuck*, ante, p. 95.
(*l*) *Jarvis* v. *Dean*, 11 Moore, 359.

tending to show that the tenement on which the nuisance exists belonged to him, or was under his control, will, of course, be evidence against him (*m*). Proof that the defendant has received rent for the use of a wall-building or pavement, and has previously repaired it when it requires repairs, has been held sufficient to render the defendant responsible for a nuisance existing thereon (*n*).

If the plaintiff complains of a nuisance arising from the non-repair of drains and sewers, it must be shown that the defendant had the use and occupation of the drain and sewer. Proof that the defendant occupies the land through which the sewer runs does not cast upon the defendant the duty of cleaning out the sewer or repairing it, or preventing it from becoming a nuisance. It does not follow, from his being the occupier of the land through which the sewer runs, that he has the occupation and use of the sewer. He may never have used it or occupied it, and may have no power to touch it, or interfere with it in any way (*o*). The parties who have a right to use the sewer, and who exercise that right, are in general bound to cleanse the sewer, and repair it, and prevent it from becoming a nuisance, unless the duty of so doing is imposed on others by express legislative enactment.

If the defendant is not in the actual occupation of the premises on which the nuisance exists, but it is sought to make him liable, on the ground that he demised the premises with the nuisance existing upon them, it must be proved that the nuisance was in existence at the time of the demise (ante, pp. 137, 138). If it is sought to make him liable for injuries arising from dangerous excavations, pits, or holes on premises demised by him, or from the fall of ruinous buildings in the occupation of his tenant, it must be shown that the holes and excavations existed, and that the buildings were ruinous and dangerous to the public at the time he let them. If the action is brought against the occupier of ruinous buildings, which have fallen down and injured the plaintiff, a *primâ facie* case will be established against the defendant, merely by proving that he was in the actual or constructive occupation of the property at the time of the injury; and it will be for the defendant to show, if he can, that he was a mere tenant-at-will, and had no knowledge of its ruinous or dangerous condition; or that before the buildings fell he ceased to occupy them, and gave up possession to the landlord (ante, pp. 147, 148).

If the defendant is charged with acts of omission, non-feazance, and neglect of duty, the facts creating the duty must be proved, and the defendant's neglect established. If the injury arises from the non-repair of party walls or fences, it must be shown that the defendant was bound

(*m*) *Sybray* v. *White*, 1 M. W. 440.
(*n*) *Bishop* v. *Trustees Bed. Charity*, 1 Ell. & Ell. 697; 28 Law J., Q. B. 215.
Payne v. *Rogers*, 2 H. Bl. 349.
(*o*) Post, ch. 6.

by contract, prescription, or statute, to repair or fence (ante, pp. 102, 149). If it arises from the negligent use and management of buildings, stations, or railways (ante, pp. 147–153), or canals or docks (ante, p. 154), it must be shown that the defendants were in the occupation of the property upon which the dangerous nuisance existed, and had dominion and control over it. If the injury arose from the dangerous state of premises on which the plaintiff was employed as a workman, it must be shown that the danger was latent and unknown to the workman, but well known to the employer (ante, pp. 155, 156). If it arose from defective hoisting-tackle in mines or insecure ladders, it must be shown that the defendant ordered or selected the tackle, or knew that it was insecure and unfit to be used, and that the plaintiff had no knowledge of the danger he incurred by using it (ante, pp. 156, 157). If the plaintiff complains of injuries from the dangerous state of premises in the occupation of the defendant, and to which he had come on the invitation of the defendant as a guest, he must show that the danger was of an unusual and unexpected character, the existence of which was wholly unknown to the plaintiff, but was well known to the defendant (ante, p. 157).

In actions for injuries for keeping ferocious animals, the plaintiff must prove that he has been bitten or hurt, or has sustained some actual damage from the ferocity of the animal, and that the defendant kept or harboured the animal with knowledge of its savage disposition; but it is not necessary to allege or prove any negligence or want of care in the keeping of it (ante, p. 158). If the plaintiff has not, by his declaration, tied himself down to proof of some particular mischievous propensity on the part of the animal, it is sufficient for him to prove, generally, that the animal was of a ferocious nature, and given to bite, and that the defendant knew it (*p*). Where a dog was proved to be of a savage disposition, and the defendant had warned a person to beware of the dog, lest he should be bitten, it was held that this was evidence for a jury of the defendant's knowledge of the nature of the beast (*q*). If it can be shown that a dog has been guilty, to the knowledge of the owner (*r*), of a single act of ferocity, that is sufficient to impose upon the owner the duty of watching and securing the animal, and will render the master responsible in damages if the dog is guilty of another ferocious act. Where, therefore, a dog attacked and bit a child, to the knowledge of the defendant, and four years afterwards worried and destroyed the plaintiff's sheep, it was held that the defendant was responsible for the damage done (*s*).

Proof of an offer on the part of the defendant to make compensation to the plaintiff is some, but very slight, evidence against the defendant, as

(*p*) *Hartley* v. *Halliwell*, 2 Stark, 212.
(*q*) *Judge* v. *Cox*, 1 Stark, 285.
(*r*) *Fleeming* v. *Orr*, 2 Macq. Sc. A. 25.
(*s*) *Gettring* v. *Morgan*, 5 W. R. 536, ante, p. 163.

the offer may have been made purely from charitable and praiseworthy motives, and not as admitting any consciousness of wrong or of legal liability in the matter. Where the defendant, being told that his dogs had killed three of the plaintiff's cattle, said, that if they had done it, he would settle for it, it was held that this promise to pay, or settle for the damage done, was some evidence for a jury of knowledge on the defendant's part of the savage disposition of his dogs. "But though," observes the Court, "we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them" (*t*); and Lord Ellenborough held that such an offer was no evidence at all of the scienter (*u*).

Evidence for the defence.—Where the plaintiff sues for a nuisance, arising from the exercise by the defendant of a noxious trade, in the vicinity of the plaintiff's dwelling, and the defendant has put a plea of justification on the record, he must prove the material averment of his plea, and show how his right to create the nuisance arises. Under the plea of not guilty, the defendant may, as we have seen, show that the injury was occasioned by the plaintiff's negligence and misconduct, as well as by the default of the defendant, and so defeat the plaintiff's claim for damages (*x*). If it be shown that the defendant was a wilful trespasser upon the land of the plaintiff, and must have known that he had no right to be there at the time he sustained the injury of which he complains, his claim for damages will, in general, be defeated.

Damages recoverable.—For every nuisance, the continuance of which would inflict permanent injury upon premises demised to a tenant, and diminish their value in the market, damages are recoverable by the reversioner in respect of the injury to the inheritance, as well as by the tenant, in respect of the immediate residential injury. Thus, where the subject of complaint was, that the defendant had fixed a spout to the eaves of his house, which poured rain-water into the plaintiff's yard and made it damp, it was held that this was an injury of a permanent nature, which entitled the plaintiff to damages, although the yard was in the occupation of a tenant (*y*). But where an action is brought by a reversioner to recover damages in respect of an injury to his reversionary estate in certain lands and premises, by reason of a nuisance committed by the defendant, the diminution in the saleable value of the premises is not the true criterion of damage, because every day that the defendant persists in continuing the nuisance, he renders himself liable to another action. Nominal damages are generally given in the first action; and then, if the defendant persists in continuing the nuisance, and another action is brought, and a

(*t*) *Thomas* v. *Morgan*, 2 C. M. & R. 502.

(*u*) *Beck* v. *Dyson*, 4 Campb. 198; and see post, ch. 22.

(*x*) Ante, pp. 16, 174; post, ch. 8, s. 1.

(*y*) *Tucker* v. *Newman*, 11 Ad. & E. 41.

verdict is obtained against him for continuing the nuisance, the jury generally give exemplary damages, to compel an abatement of the nuisance (*z*). If, however, the jury choose to give substantial damages in the first instance, there is nothing to prevent them from so doing (*a*).

Wherever the nuisance was, in its commencement, an injury to the reversion, on any ground whatever, the continuance of the nuisance must be so likewise, and an action is maintainable by the reversioner, *toties quoties*, until the nuisance is abated (*b*). In all cases of continuing nuisances, the jury cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action; for every day that the nuisance continues there is a fresh cause of action, in respect of which further damages are recoverable.

If the plaintiff's house has been thrown down by reason of the negligence of the defendant or his servants in pulling down an adjoining house, the jury ought not to give as much in damages as would be sufficient to build a new house, but should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one. Lord Kenyon likened a case of this sort to the case of marine insurances, where an allowance of one-third new for old was always made (*c*).

In actions for injuries from keeping ferocious animals (ante, p. 158), the plaintiff is entitled to recover substantial damages in respect of any bodily anguish he has endured, together with the expenses of surgical attendance, and all such expenses as have been reasonably and necessarily incurred by him in consequence of the injury, and have been claimed in the plaintiff's declaration. If, in consequence of a bite from a ferocious dog, knowingly kept and harboured by the defendant, the plaintiff has been obliged, under medical advice, to undergo a surgical operation to guard against hydrophobia, this will be a ground for increasing the damages (*d*).

SECTION III.

PREVENTION OF NUISANCES BY INJUNCTION AND INDICTMENT.

Injunction.— Both the courts of common law (*e*) and chancery will, by injunction, prevent the continuance of a nuisance on one man's land to the

(*z*) *Battishill* v. *Reed*, 18 C. B. 714; 25 Law J., C. P. 290.
(*a*) Cresswell, J., 18 C. B. 712.
(*b*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; ante, p. 103.
(*c*) *Lukin* v. *Godsall*, 2 Peake, 15.
(*d*) Post, ch. 22.
(*e*) As to injunction at common law, see post, ch. 23.

injury or annoyance of another (*f*). An injunction will be granted, in certain cases, to prevent the fouling of a stream by pouring into it the contents of sewers, and the refuse of dye-houses and manufactories (*g*); also to prevent the burning of bricks (*h*), the erection of coke-ovens (*i*) and densely-smoking chimneys (*j*), and the carrying on of gas-making or any noisome trade, so as seriously and materially to interfere with the ordinary comfort and enjoyment of a neighbouring dwelling-house, or to injure the trees or vegetation of the neighbouring fields (*k*). When the nuisance is of a permanent character, such as a nuisance caused by the erection of a building, which obstructs the passage of light and air to ancient windows, the courts will interfere to protect the proprietary interests of the reversioner, as well as to protect the enjoyment by the tenant or occupier (*l*). But where the injury is of a temporary nature, not likely to last long, nor to deteriorate the marketable value of the property, the reversioner has no claim to the equitable interference of the court (*m*); nor will the court interfere in any case, unless some serious inconvenience has been sustained, or some actual damage done or threatened (*n*).

Acquiescence precluding equitable relief.—In some cases it has been held to be the duty of a party seeing a nuisance in progress, and having the power of abating it and stopping it, to give notice to the party erecting the nuisance of his intention to object; and it is clear that a person may so encourage that which he afterwards complains of as a nuisance, as to preclude him from any claim in equity to an injunction (*o*). If a party sees a building in progress of erection which, when completed, must necessarily darken his windows, and nevertheless allows the building to be completed, and finished, and decorated, at great expense, without making any protest or complaint, or taking any proceedings against the wrong-doer, the Court of Chancery will not interfere by injunction compelling the pulling down of the building, but will leave the complainant to his remedy at law (*p*). But acquiescence in the erection of injurious buildings, or of noxious works, while they produce little injury, will not deprive the acquiescing party of his right to an injunction if the nuisance is increased and becomes productive of more serious damage; otherwise it would follow that a partial obscuration of ancient lights might be fol-

(*f*) *Oldacre* v. *Hunt*, 19 Beav. 489.

(*g*) *Wood* v. *Sutcliffe*, Sim. N. S. 163. *Att.-Gen.* v. *Boro. Birm.*, 4 K. & J. 528.

(*h*) *Walter* v. *Selfe*, ante, p. 130.

(*i*) *Semple* v. *Lond. & Birm. Rail. Co.*, 1 Rail. Cas. 120.

(*j*) *Sampson* v. *Smith*, 8 Sim. 272. *Bidder* v. *Croyd. Loc. Board*, 6 Law T. R., N. S. 778.

(*k*) *Imp. Gas, &c. Co.* v. *Broadbent*, 7 H. L. C. 600. *Haines* v. *Taylor*, 10 Beav. 75. *Att.-Gen.* v. *Cleaver*, 18 Ves. 211, ante, p. 135.

(*l*) *Wilson* v. *Towend*, 30 Law J., Ch. 25. *Herz* v. *Un. Bank*, 2 Giff. 686; 1 Jur., N. S. 127.

(*m*) *Cleeve* v. *Mahany*, 9 W. R. 882.

(*n*) *Wandsworth Board, &c.* v. *Lond. & S. W. R.*, ante, p. 60.

(*o*) *Williams* v. *Earl of Jersey*, 1 Cr. & Ph. 97.

(*p*) *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 Law J., Ch. 123. *Cotching* v. *Basset*, 32 Law, Ch. 286; 11 W. R. 197. *Jessel* v. *Chaplin*, 4 ib. 610.

lowed by their total destruction, and that an easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable and natural consequence of the use of the easement.

If a person has acquiesced in the erection of chemical or smelting works, in ignorance of the nuisance that will arise from them when they are put into operation, the acquiescence in the erection is no acquiescence in the nuisance arising from them, and will not preclude him from the remedy by injunction (*q*). And if the injured party has refrained from taking any active steps to abate or put an end to a nuisance in consequence of assurances he has received from the persons creating the nuisance that measures would be taken to put a stop to it, there is no *lâches* on his part, and no such acquiescence as will deprive him of his right to an injunction (*r*).

Injunction to prevent the continuance of noisy nuisances.—If a belfry is erected so near to the dwelling-house of the plaintiff, that the bells when rung prevent people from being heard whilst talking in the house, or disturb the rest of the inmates at night, this is such an invasion of the domestic comfort and enjoyment of a man's home as entitles him to an injunction to prevent the nuisance (*s*).

Prevention of public nuisances.—*Writs of prohibition* were formerly issued by courts of common law to prevent the continuance of a public nuisance, such as the bowling alley near St. Dunstan's Church; the rope-dancer's stage at Charing Cross; and the play-house in Little Lincoln's Inn Fields (*t*); and courts of equity will interfere by injunction to prevent public nuisances, such as nuisances to public rivers, and public harbours, and public roads; and magistrates, and boards of health, and commissioners of public works, may be restrained from exercising their statutory powers, so as to create or occasion a public nuisance (*u*).

Where, by an act of parliament, a corporation were directed to cause a piece of land to be drained and levelled, and kept in a proper condition, for purposes of public recreation, the court restrained the corporation from using it for the holding of a cattle fair (*x*). In informations and proceedings for the prevention of public nuisances, the ordinary course is for the attorney-general to sue, as representing the public; but individuals may come forward and invoke the assistance of the court when they have themselves individually sustained damage, and the interposition of the

(*q*) *Bankart* v. *Houghton*, 27 Beav. 431; 28 Law J., Ch. 473.

(*r*) *Att.-Gen.* v. *Birmingham*, 4 Kay & J. 546. *Davies* v. *Marshall*, 31 Law J., C. P. 61.

(*s*) *Soltau* v. *De Held*, 2 Sim. N. S. 133.

(*t*) *Hall's* case, 1 Mod. 76. *Rex* v. *Betterton*, 5 Mod. 142; Skin. 625, 627. *Rex* v. *Dorset Just.* 15 East, 594.

(*u*) *Att.-Gen.* v. *Forbes*, 2 Myl. & Cr. 133; post, ch. 16, s. 3.

(*x*) *Att.-Gen.* v. *Corp. of Southampton*, 29 Law J., Ch. 282; 1 Giff. 363.

court is required for the protection of their property (*y*), or the preservation of the beneficial use, occupation, and enjoyment of it (*z*).

The same principles of law guide the interference of the court whether the nuisance be a public or a private nuisance (*a*).

The court will not grant an interlocutory injunction before the hearing of the cause, unless it is necessary for the protection of property, or the prevention of some threatened injury thereto (*b*); nor will it interfere in any case, as we have seen, to protect a dry legal right or title, merely because the legal right is infringed (*c*).

Prevention of public nuisance by indictment.—In the case of public nuisances, such as obstructions in public thoroughfares or navigable rivers, or suffering boughs of trees to overhang highways, or ditches adjoining them to become foul and choked up, or buildings by the side of public thoroughfares to become ruinous, the remedy is by indictment in respect of the public injury (*d*), and by action in respect of any particular or special damage sustained by individuals (*e*).

The following nuisances have been held indictable:—The overcrowding of houses with poor people in time of infection of plague, and thereby endangering the health of the neighbourhood (*f*); the carrying of people infected with contagious disorders along public thoroughfares in such a way as to endanger the health of the passengers (*g*); the keeping of large quantities of gunpowder in dangerous proximity to populous neighbourhoods (*h*); the carrying on of noxious and offensive manufactures in public places, or adjoining public thoroughfares, so as seriously to incommode and annoy large numbers of persons (*i*); holding out inducements to people to collect together in large crowds, to the obstruction of public thoroughfares; the treading down the grass of the neighbouring meadows, the destruction of fences, or the creation of alarm and disturbance in the surrounding neighbourhood (*k*); the making of a great noise in the night with a speaking trumpet, to the disturbance of divers householders (*l*); sawing of logs of timber in a public street, and incumbering a road or footpath with barrels of beer (*m*); the opening of new coal-holes, and

(*y*) *Crowder* v. *Tinkler*, 19 Ves. 621. *Att.-Gen.* v. *Forbes*, 2 Myl. & Cr. 129. *Spencer* v. *Lond. & Birm. Rail. Co.*, 1 Rail. C. 159; 8 Sim. 193. *Sampson* v. *Smith*, 8 Sim. 272.

(*z*) *Soltau* v. *De Held*, ante, p. 181.

(*a*) *Att.-Gen.* v. *Sheff. Gas. Co.*, 3 De Gex, M. & G. 315; 22 Law J., Ch. 812.

(*b*) *Att.-Gen.* v. *Elect. Tel. Co.*, ante, p. 60.

(*c*) *Wandsworth Board* v. *Lond. & S. W. R.*, ante, p. 60.

(*d*) *Rex* v. *Russell*, 6 East, 427. *Rex* v. *Cross*, 3 Campb. 226. *Rex* v. *Jones*, 3 Campb. 230. *Reg.* v. *Watson*, 2 Ld. Raym. 856. *Weld* v. *Hornby*, 7 East, 195. *Reg.* v. *Leech*, 6 Mod. 145.

(*e*) Ante, p. 166. *Rex* v. *Dewsnap*, 16 East, 196.

(*f*) 2 Roll. Abr. 139, pl. 3.

(*g*) *Rex* v. *Vantandillo*, 4 M. & S. 73.

(*h*) *Rex* v. *Taylor*, 2 Str. 1167. *Biggs* v. *Mitchell*, 31 Law J., M. C. 163.

(*i*) *Rex* v. *White*, 1 Burr. 335. *Rex* v. *Pappineau*, 2 Str. 686. *Rex* v. *Neil*, 2 C. & P. 485.

(*k*) *Rex* v. *Moore*, 3 B. & Ad. 184; 2 Chitt. Crim. Law, 647.

(*l*) *Rex* v. *Higginson*, 2 Burr. 1233.

(*m*) *Rex* v. *Jones*, 3 Campb. 229.

unloading coals in a public thoroughfare, in places where no coal-hole previously existed, and where the highway was not originally dedicated subject to the use of it for domestic coaling (*n*); making excavations and openings in the soil of a highway, or in the pavement of a public street, for water, gas, sewerage, or other purposes, without parliamentary authority (*o*); the use on a highway of a traction steam-engine, which, by its noise and appearance, frightens horses, and makes the highway dangerous to persons riding or driving (*p*); mixing of large quantities of alum and deleterious and prohibited ingredients in bread, intended for the use and consumption of the public (*q*); keeping of a disorderly house, gaming-house, or bawdy-house (*r*); indecent bathing (*s*), and the indecent exposure of the person in any public place within view of persons resorting there, or within view of the inhabitants of a dwelling-house (*t*). But the exposure must be in the presence or within view of more persons than one, in order to render it a public nuisance (*u*), and it must be a wilful and indecent exposure, and not such an exposure as may be made in a public urinal (*v*), or under the pressure of paramount necessity.

It is no defence to an indictment for a public nuisance to show that the public generally are benefited by it, though a portion of the public may be inconvenienced, "for if the violation of rights which belong to any part of the public is to be vindicated by the benefit which may arise to another part of the public elsewhere, inquiries would be introduced of a most vague and unsatisfactory nature, and speculations entered into which no jury could be expected properly to decide" (*x*).

Nuisances in public highways.—"Highway is the genus of all public ways, as well cart, horse, and foot-ways, and an indictment lies for any one of these ways, if they be common to all the Queen's subjects having occasion to pass there; that is, if it be a foot-way only, common to them all, or a horse-way and a prime-way; and these are not *altæ regiæ viæ*, for that is the great highway common to cart, horse, and foot, that please to use it" (*y*).

Proof of dedication of way to the public.—If the owner of the soil makes and throws open a foot-way or carriage-way leading from one part of a public thoroughfare to another part of a public thoroughfare, and

(*n*) Cockburn, C. J., 29 Law J., M. C. 123.

(*o*) *Reg.* v. *Longton Gas Co.*, 29 Law J., M. C. 119.

(*p*) *Watkins* v. *Reddin*, ante, p. 143.

(*q*) *Rex* v *Dixon*, 3 M. & S. 11.

(*r*) *Rex* v. *Smith*, 2 Str. 704. *Reg.* v. *Rogier*, 1 B. & C. 272. *Reg.* v. *Williams*, 1 Salk. 383.

(*s*) *Rex* v. *Crunden*, ante, p. 33.

(*t*) *Sidley's* case, 1 Sid. 168. *Holmes's* case, Dears. Cr. C. 207.

(*u*) *Reg.* v. *Watson*, 2 Cox, Cr. C. 376. *Webb's* case, 1 Den. Cr. C. 338; 2 C. & K. 933. *Elliot's* case, Leigh & Cave, C. C. R. 103.

(*v*) *Reg.* v. *Orchard*, 3 Cox, Cr. C. 248.

(*x*) Ld. Denman, C. J., *Rex* v. *Ward*, 4 Ad. & E. 460. *Rex* v. *Tindall*, 6 Ad. & E. 143. *Hegingbotham* v. *East. & Cont. St. Packet Co.*, ante, p. 135. *Reg.* v. *Train*, 31 Law J., M. C. 169; Q. B. 179, overruling on this point *Rex* v. *Russell*, 6 B. & C. 566.

(*y*) *Reg.* v. *Saintiff*, 6 Mod. 256.

neither marks by chain or bar, or visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, and the public notoriously use the way for a number of years, it is presumed to be dedicated to the use of the public, and becomes a public highway, which cannot lawfully be interrupted, though it was originally opened and intended for private convenience (*z*). The user and enjoyment of the way by the public must have been had under circumstances from which an intention on the part of the owner of the soil to dedicate the way may fairly be inferred. If, therefore, the passage of the public was allowed under some special agreement or license of the owner of the soil, the conditional and permitted user will not establish the public right. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him five shillings a-year, and find cinders to repair the road, and that the inhabitants of the parish should lay down and spread the cinders, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, and the road being left unrepaired, the owner of the land stopped up the road, it was held that there had been no dedication of the road to the public, but only a license to use it on certain terms and conditions, which license might be withdrawn on the conditions not being complied with (*a*).

Where an ancient highway was illegally stopped, and the public deviated on to the adjoining land, which was an open down, forming a track nearly parallel with the old road, which track they continued to use for about twenty years, when it was stopped, and the old road was re-opened to the public, it was held that the deviating track had not become a public highway, as it had never been used by the public except when they had been shut out from the old road, and the user being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stopped the highway (*b*), would not establish any permanent dedication of the deviating track to the use of the public, so as to make it a permanent public thoroughfare (*c*).

User of a way by the public is by no means conclusive of the way being a public way; it is evidence only to be weighed in connexion with surrounding circumstances. Where, therefore, there was a wood, and divers paths or tracks through it leading in different directions, and people wandered where they pleased through the wood and made tracks, but the

(*z*) *Rex* v. *Lloyd*, 1 Campb. 260. *Roberts* v. *Carr*, ib. 263. *Rex* v. *Barr*, 4 ib. 16.

(*a*) *Barraclough* v. *Johnson*, 8 Ad. & E. 99; 3 N. & P. 233.

(*b*) *Absor* v. *French*, 2 Show. 28. *Steel* v. *Prickett*, 2 Stark. 463.

(*c*) *Dawes* v. *Hawkins*, 8 C. B., N. S. 857.

tracks were used only in dry weather, and were hardly passable after rain, and led to no public place which could not be reached by a more convenient thoroughfare, it was held that this was a mere permissive user of the wood for purposes of recreation and pleasure, and that there was no dedication of a way to the public to be used "as of right" (*d*).

The right to the use of a public foot-way includes the right of bringing on to it all the ordinary accompaniments of a foot-passenger, not being of a size to obstruct the way and interfere with the use of it by other passengers (*e*).

Proof of animus dedicandi.—There must be on the part of the owner of the soil an *animus dedicandi*, of which the user by the public is evidence and no more, so that a single act of interruption by the owner of the soil is of much more weight upon the question of intention than many acts of enjoyment (*f*). But the question of dedication does not depend upon what a man says, but upon his acts. "A man may say that he does not mean to dedicate a way to the public, and yet, if he has allowed them to pass every day for a length of time, his declaration alone would not be regarded. The facts may warrant a jury in believing that the way was dedicated, though he has said that he did not so intend; and if his intention be insisted upon, it may be answered that he should have shown it by putting up a gate, or by some other act" (*g*). If the owner of the soil shuts up the way only one day in the year, that is sufficient to show that he does not intend to dedicate, but gives a license only (*h*).

Where the owner of the soil had placed and maintained a gate across a foot-way, with the view of preventing a public right of passage, and the gate went to decay, and for twelve years there was no gate at all, and then the owner of the soil put up a new gate at the place where the old gate formerly stood, it was held to be a question for the jury whether the owner of the soil, from suffering the gate to be down so long, and permitting the public to use the way without obstruction for so many years, had completely dedicated the way to the public, so that the gate could not be replaced (*i*). Where a bar, placed across a bridge, was kept locked, and opened only in times of flood, when the ford hard by was dangerous or impassable, it was held that this was conclusive to show that there was no general right of passage (*k*).

If there has been a public, uninterrupted user of a road for such a length of time as to satisfy a jury that the owner of the soil, whoever he

(*d*) *Schuringe* v. *Dowell*, 2 F. & F. 848. *Chapman* v. *Cripps*, ib. 867. *Mildred* v. *Weaver*, ib. 33.

(*e*) *Reg.* v. *Mathias*, ib. 570.

(*f*) Parke, B., *Poole* v. *Huskinson*, 11 M. & W. 830.

(*g*) Littledale, J., *Barraclough* v. *Johnson*, 8 Ad. & E. 105. *Surrey Canal Co.* v. *Hall*, 1 Sc. N. R. 264; 1 M. & Gr. 403.

(*h*) *Trustees Brit. Mus.* v. *Finnis*, 5 C. & P. 465.

(*i*) *Lethbridge* v. *Winter*, 1 Campb. 263.

(*k*) *Rex* v. *Marquis of Buckingham*, 4 Campb. 190.

might be, intended to dedicate the road to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who was the owner of the soil of the road during the time it was so used (*l*). The open user by the public of a way as of right raises a *primâ facie* presumption of the existence of the public right, and when such user is proved, the onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed (*m*).

If an owner of land lets land on building leases, and houses are built which require a way to them, and a way is made, and used by carts and carriages going to these houses, and which can go nowhere else, there is nothing from these facts alone to establish a dedication of the way to the public (*n*).

Occupation roads, laid out through an estate for the use and convenience of the occupiers, are not thereby dedicated to the public (*o*).

No particular time of enjoyment is necessary for evidence of dedication; it is not like a grant presumed from length of time. If the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a new street, and sells or lets the houses, that is instantly a highway, and, although the new street may terminate in a *cul de sac*, it may nevertheless be a public place, accessible to all. But if a bar or rope, or the slightest obstruction, is put up, showing that the owner of the soil does not intend to give a general and unreserved right of passage, that will prevent a dedication. And to support anything like a dedication, the street or road must be finished as a perfect street; for if the foot-ways are not completed, or paving has to be done, or fences to be put up, the evidence of an intention to dedicate is insufficient (*p*), unless the way has been used in its unfinished state as a public thoroughfare for a considerable number of years (*q*).

There may be a highway, by dedication to the public, where there is no thoroughfare.— Where there was a public street, and at the side of it a passage leading to a court, consisting of fifteen houses, all of which belonged to the plaintiff, but the court had been freely used by the public for many years without restriction, it was held that this was evidence from which a jury might find a dedication to the public, although the court and thoroughfare had originally been made for the use of the

(*l*) *Reg.* v. *East. Mark.* 11 Q. B. 877. Williams, J., *Dawes* v. *Hawkins*, 8 C. B., N. S. 857; 29 Law J., C. P. 343; 7 Jur. N. S. 262.

(*m*) *Reg.* v. *Petrie*, 4 Ell. & Bl. 737.

(*n*) *Woodyer* v. *Hadden*, 5 Taunt. 140.

(*o*) *Selby* v. *Cryst. Pal. Distr. Gas Co.*, 31 Law J., Ch. 595.

(*p*) *Woodyer* v. *Hadden*, 5 Taunt. 140.

(*q*) *Jarvis* v. *Dean*, 3 Bing. 447.

occupiers of the houses, and led only to their dwellings (*r*). A highway, therefore, may exist, though it is not a thoroughfare. But if a road be made for the accommodation of particular persons only, it is not a public road, and there is no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it, and exclude the public (*s*).

Who may dedicate.—A mere tenant or lessee has no power to throw open land to the public, and create a public thoroughfare in derogation of the rights of the landlord or reversioner. There cannot be a public way by dedication, unless there be some evidence to show that the owner of the soil has consented to such user. The consent of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance (*t*). But if the acts of user are notorious, and go on for a great length of time, and notwithstanding a frequent change of tenants, it may be presumed that the owner has been made aware of them, and that the way was used with his concurrence (*u*).

"*Commissioners of public works have no power to dedicate* to the use of the public, as a highway, land which they have been intrusted with the ownership of for a special purpose, and for which special purpose the land may at some future period be required. As all the King's subjects are presumed to know acts of parliament, they, when they used the road, must be presumed to have known that, in point of law, it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by parliament, and which, therefore, could not be infringed upon" (*x*).

Limited dedication.—There may be a dedication of a way for a limited purpose, as for a foot-way, horse-way, or drift-way, but there cannot be a dedication to a limited part of the public. Such a dedication would be simply void (*y*). A way may be dedicated to the use of the public for all purposes except that of carrying coals, so that persons carrying coals may be prevented from passing along it (*z*). Where there was a strip of open, uninclosed land between a public carriage-road and a paved footpath, and the owners of the houses by the side of the paved foot-way had always, by permission of the owner of the soil, used the space between the foot and carriage-way for purposes connected with their occupations, whenever they had occasion, and such use as the public had of it was of a limited and

(*r*) *Bateman* v. *Bluck*, 21 Law J., Q. B. 407.

(*s*) Best, J., *Wood* v. *Veal*, 5 B. & Ald. 457.

(*t*) *Wood* v. *Veal*, 5 B. & Ald. 454. *Harper* v. *Charlesworth*, 4 B. & C. 591.

(*u*) *Davies* v. *Stephens*, 7 C. & P. 570.

(*x*) Littledale, J., *Rex* v. *Leake*, 5 B. & Ad. 485.

(*y*) Parke, B., *Poole* v. *Huskinson*, 11 M. & W. 830.

(*z*) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257.

uncertain character, and was subject to the use of it made by such occupiers, it was held that the dedication to the public of the use of the intermediate space was subject to the use made of it by the landlord and his tenants (*a*).

A highway may also, as we have seen, be dedicated to the public, subject to the existence of steps, cellar-flaps, and obstructions rendering the way dangerous, so that the public must take the way subject to these inconveniences (ante, pp. 143, 144).

Gates across a highway.—When a way has been dedicated to the use of the public subject to a gate across it, the public can only take the way subject to the inconvenience of the gate; but when the way has been dedicated without a gate, the owner of the soil cannot lawfully obstruct the road with a gate (*b*).

There can be no dedication for a limited time, certain or uncertain. If dedicated at all, the way is dedicated in perpetuity. Hence the maxim "once a highway, always a highway"—for the public cannot release their right, and there is no extinguishment of the public right by presumption or prescription (*c*).

Common highway of necessity.—"If there be but one road to a place, and no other way of going, that is a way of necessity; if the jury find this, we take it to be a common highway by necessity" (*d*). If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed a public way (*e*).

Proof of highway by proof of parish repairs.—The fact of a road having been repaired by a parish "as far back as living memory can go," is a strong fact in favour of the road being a public road, but it is not conclusive (*f*).

Indictable obstructions in public thoroughfares.—A highway may, as we have seen, be dedicated to the public subject to a pre-existing easement, such as a right vested in the owners of adjoining land, of depositing goods thereon in certain places (*g*).

In the case of an ordinary highway running between fences, the right of way or passage *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and passengers. It is an indictable offence, there-

(*a*) *Le Neve* v. *Vestry Mile End, &c.*, 8 Ell. & Bl. 1054; 27 Law J., Q. B. 208.
(*b*) *James* v. *Hayward*, ante, p. 144.
(*c*) Byles, J., *Dawes* v. *Hawkins*, 8 C. B., N. S. 857; 29 Law J., C. P. 343.
(*d*) *Chichester* v. *Lethbridge*, Willes, 72.
(*e*) *Reg.* v. *Inhab. of Hornsey*, 10 Mod. 150.
(*f*) *Reg.* v. *Hawkhurst*, 11 W. R. 9; 7 Law T. R., N. S. 268.
(*g*) *Morant* v. *Chamberlain*, *Le Neve* v. *Mile End, &c. Vestry*, ante, p. 144.

fore, to place posts on greensward and open places extending between the metalled part of the road and the fence, dividing the road from the adjoining land, although the posts do not in point of fact offer any injurious obstruction to the public traffic. It is enough that they do stand in the way of those who may wish to traverse the whole space between the fences (*h*); and neither vestry trustees nor commissioners of highways can authorize the placing of anything on a highway which constitutes a public nuisance; and it is no answer to an indictment for obstructing a thoroughfare to show that the obstruction, such as a tramway, though an annoyance to some passengers, is a great convenience to others, for "you cannot, for the advantage of one part of the public, commit acts which are a nuisance to another part" (*i*).

Indictable obstructions in navigable rivers.—An erection in a port or navigable river is not to be deemed a nuisance, simply because it infringes on the water-way. It is not every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto* in law a nuisance, for that would destroy all the quays in all the ports of England. Whether a building, in or near the water, be a nuisance or not, is a question of fact, to be determined by a jury, on evidence, and not a question of law (*k*). "Where the navigation of a river has become obstructed by a vessel which has sunk, and been lost to the owner, without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. Lord Kenyon held that the owner of a ship sunk in the Thames by accident and misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended, for the prosecution, in this case, that although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property" (*l*).

Repair of highways.—The last general Highway Act (5 & 6 Wm. 4, c. 50, s. 23), requires three months' notice to be given to the surveyor of highways of the intention to dedicate any road or occupation way, made by private persons, bodies politic or corporate, or any private drift-way and horse-path, set out in any award of commissioners under an inclosure

(*h*) *Reg.* v. *Un. King. Tel. Co.*, 31 Law J., M. C. 107. *Rex* v. *Wright*, 3 B. & Ad. 683.

(*i*) *Reg.* v. *Train*, 31 Law J., M. C. 169. *Rex* v. *Ward*, *Rex* v. *Tindall*, ante, p. 183.

(*k*) Hale, De Portibus Maris, 85. *Rex* v. *Russell*, 6 B. & C. 572.

(*l*) *The King* v. *Watts*, 2 Esp. N. P. C. 675. *Brown* v. *Mallet*, 5 C. B. 616. *White* v. *Crisp*, ante, p. 146.

act, describing its situation and extent, and the certificate of two justices in petty sessions that it has been made in a substantial manner, and of the width required by the act before any such road, &c., shall be deemed to be a highway, which the inhabitants of the parish shall be compellable to repair, but in all other respects as regards the right of the public to use it, it remains a highway (*m*).

If a highway is washed away and totally destroyed by the sea, so that there is no longer anything left to repair, and nothing that can be effectually restored, the parish is released from its liability to repair (*n*).

Liability to repair ratione clausuræ.—Where a defendant is sought to be made responsible for the non-repair of a highway, on the ground that he has inclosed vacant spaces of ground adjoining the highway, and encroached on land used for passage when the beaten track was foundrous, it must be proved, first, that the highway has been used immemorially as a highway, secondly, that the land inclosed has been used for passage when the beaten track was foundrous, thirdly, that the defendant is the occupier of the inclosed land taken from the public thoroughfare, for there is neither precedent nor authority for charging the owner not in possession (*o*).

(*m*) *Roberts* v. *Hunt*, 15 Q. B. 17.

(*n*) *Reg.* v. *Hornsea*, 23 Law J., M. C. 59.

(*o*) *Reg.* v. *Ramsden*, Ell. Bl. & Ell. 949; 27 Law J., M. C. 206.

CHAPTER V.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE, AND FIRE.

SECTION I.—*Of injuries to realty from waste, &c.*—Commissive and permissive waste—Waste by lessees, tenants for term of years, tenant-at-will, and tenant for life—Waste in trees and woods—Decaying timber—Equitable waste, where tenant for life holds without impeachment of waste—Waste by copyholders and tenants in common—Waste from the removal of things attached to the freehold—Landlord's fixtures—Tenant's fixtures—Ornamental and trade fixtures—Fixtures removable by custom—Abandonment of the right to disannex and remove fixtures—Right of purchasers and mortgagees to enter and remove fixtures—Waste by strangers upon lands demised to tenants—License to commit waste—Injuries from fire—Fire spreading from blast-furnaces, steam-engines, and railways—Fires occasioned by the negligence of servants—Injuries from gunpowder and explosive substances.

SECTION II.—*Of remedies for injuries to lands from waste, negligence, and fire.*—Actions for waste—Actions by owners of insured premises—Parties, pleadings, defences, and evidence—Assessment of damages.

SECTION III.—*Of injunction to prevent waste.*—Parties liable to an injunction—Effect of acquiescence in the commission of waste—Lâches or delay in seeking a remedy.

SECTION I.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE, AND FIRE.

"*Waste*," observes Blackstone, "is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Tenant for life or term of years was not by the common law responsible for waste, nor was waste punishable," observes Blackstone, "in any tenant, excepting guardian in chivalry, tenant in

dower, and tenant by the curtesy. And the reason of the diversity was, that the estate of these three tenants was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee: and if he did not, it was his own default" (*p*). But, for the benefit of reversioners, it was provided by the statutes of Marlbridge, 52 Hen. 3, c. 23, and of Gloucester, 6 Ed. 1, c. 5, that every man from thenceforth should have a writ of waste in the chancery against him that holdeth for term of life or years, or a woman in dower. And for waste made in the time of wardship, it shall be done as is contained in the great charter, &c. Since the passing of these statutes, therefore, all tenants for life or term of years have been liable in damages for waste, unless their leases have been made to them without impeachment of waste. All tenants, whatever their term or interest, are liable for commissive waste; but a mere tenant at-will, or from year to year, is not responsible for permissive waste (*q*).

Commissive and permissive waste.—Commissive, or, as it is more frequently termed, wilful waste, consists, amongst other things, in the doing by a tenant of some wilful injury to the premises demised to him, such as pulling down houses and buildings, prostrating walls, removing landlord's fixtures, breaking windows, or tiles and slates, and uncovering the roofs of houses. Permissive waste is where the tenant remains a passive spectator of decay and ruin, doing nothing to accelerate, and making no effort to retard, the evil.

Permissive waste by lessees for terms of years.—A tenant for term of years is responsible for permissive as well as commissive waste (*r*), but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay, the landlord is the person to provide a new one, if he think fit (*s*). A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavours to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof, but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet. The extent of the liability of a lessee, not holding under a covenant or agree-

(*p*) 2 Bl. Com. ch. 18, s. 6.
(*q*) *Harnett* v. *Maitland*, 16 M. & W. 257. *Redfern* v. *Smith*, 1 Bing. 382.
(*r*) *Yellowly* v. *Gower*, 11 Exch. 294; 24 Law J., Exch. 299.
(*s*) Bayley, J., *Wise* v. *Metcalfe*, 10 B. & C. 314.

ment to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own term and interest in the property; for a tenant-at-will, or tenant from year to year, cannot be expected to do as much for the preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste; and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them (*t*).

Commissive waste by tenants for terms of years.—Whenever a tenant or lessee makes material changes in the nature of the premises demised to him, which have the effect of converting them into something substantially different from what they were at the time they were placed in his hands, he is guilty of commissive waste, and is responsible in damages for infringing upon the proprietary rights of the landlord. The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations (*u*). Therefore an action is maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance (*x*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value (*y*), and for removing a partition-wall in a house and enlarging a chamber (*z*).

Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner (*a*). But if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition (*b*).

(*t*) 2 Roll. Abr. WASTE (C).
(*u*) *Smyth* v. *Carter*, 18 Beav. 78.
(*x*) *Provost, &c. Queen's College*, v. *Hallett*, 14 East, 489.
(*y*) *Cole* v. *Green*, 1 Lev. 309.
(*z*) 2 Roll. Abr. 815, pl. 9.
(*a*) *Young* v. *Spencer*, 10 B. & C. 145.
(*b*) *Provost, &c. Queen's College* v. *Hallett*, 14 East, 489.

A lessor may sue for commissive waste, although the lease contains a covenant upon which the lessor might maintain an action for the same wrong. It is no answer for the lessee to say that an action of covenant may also be maintained against him in respect of the same cause of action, for the lessor may have either remedy (*c*).

The lessee of a water-mill, worked by a head of water penned back under a prescriptive right to pen back water for the purpose of working the mill, has no right to alter the height of the tumbling-bay, or transpose or alter the old permanent water-marks, as it tends to destroy the landlord's evidence of title to the head of water, and goes to the destruction of the thing granted. The lessee of house-property must not remove wainscots or floors, nor pull down and rebuild, open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill or malt-mill, or a water-mill into a windmill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant (*d*). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut sallows, maples, beeches, and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease. He must not remove virgin soil (*e*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for

(*c*) *Kinlyside* v. *Thornton*, 2 W. Bl. 1111. *Torriano* v. *Young*, 6 C. & P. 8. *Marker* v. *Kenrick*, 13 C. B. 198.

(*d*) Bac. Abr. (WASTE). *Cole* v. *Forth*, 1 Mod. 94, Co. Litt. 53a, 53b.

(*e*) *Higgon* v. *Mortimer*, 6 C. & P. 616.

the landlord when he goes out as he found when he was intrusted with the possession and use of the property (*f*).

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, be it annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (post, p. 203); and there is no difference in law if it be fastened by great nails, or little nails, or by screws or irons put through the posts or walls (*g*), for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the party entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil (*h*).

Waste by tenant from year to year.—Tenant from year to year is not responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding from year to year, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C. J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable against tenant from year to year, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it" (*i*). But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from rain.

Tenant-at-will.—"If a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied. But if tenant-at-will commit voluntary waste, as in pulling down of houses or felling trees, the lessor shall have an action of trespass against him," for this amounts to a determination of the will, and the tenant so acting is a mere trespasser (*k*).

Tenant for life.—Tenant for life is, by the statute of Gloucester (ante,

(*f*) *D'Arcy (Ld.)* v. *Askwith*, Hob. 234. *Phillips* v. *Smith*, 14 M. & W. 593. Bac. Abr. (WASTE), Litt. s. 71.

(*g*) *Herlakenden's* case. 4 Co. 63b. *Wilde* v. *Waters*, 16 C. B. 637.

(*h*) *Lancaster* v. *Eve*, 5 C. B., N. S. 717; 7 W. R. 260.

(*i*) *Gibson* v. *Wells*, 1 N. R. 290. *Herne* v. *Benbow*, 4 Taunt. 764. *Martin* v. *Gilham*, 7 Ad. & E. 543.

(*k*) Litt. sec. 71; Co. Litt. 57a. *Harnett* v. *Maitland*, 16 M. & W. 262.

p. 192), put upon the same footing, with regard to waste, as tenant for term of years, and is responsible for permissive as well as commissive waste, so that if he fails to keep up and maintain buildings, walls, and fences, he will be liable to an action for dilapidations. If the roofs of houses are uncovered by the wind, he must, in convenient time, repair them; but if buildings are blown down by a violent tempest, or destroyed by lightning, he is not bound to rebuild. And if a house was uncovered and ruinous when he came into possession of it, it is then no waste to suffer it to fall down, as he is not bound to keep up and maintain a mere ruin (*l*). He is entitled to all such trees felled by the wind as he would have been entitled himself to fell, and also to all proper thinnings of plantations, &c., as well as to all coppices and osier beds cut in the nature of crops, but it seems to be doubted whether he has a right to cut poles (*m*).

Waste in trees and woods may be committed in Buckinghamshire by the cutting of beeches, because there, by the custom of the country, they are the best timber; and the same may be said of birches in Berkshire (*n*). If the tenant suffer the young germins to be destroyed, either by stubbing them up, or suffering a wood to be open, by which beasts enter and eat them off, it will be waste, though they grow up again, for after such destruction they will never be great trees, but shrubs. But the cutting down of seasonable underwood, of hazel, willows, maple, or oak, in a husbandlike manner, at the usual seasons, and of the usual growth, in accordance with the custom of the country, is not, as we have seen, waste (ante, p. 194); nor, if it is the custom to cut ashes from ten years to ten years, is it waste so to cut them; but it is, in general, waste to cut down young trees of that growth fit for great timber (*o*). But the tenant is, in general, entitled to take sufficient wood for necessary repairs to buildings and fences, to enable him to keep them up in the same state as he found them, but not for the purpose of making new fences, &c., where none before existed (*p*).

Where timber is decaying from age, and requires cutting to prevent its deterioration, the Court of Chancery will order the timber to be cut and sold, and the proceeds of the sale invested, and the interest thereof paid to the tenant for life, and the capital paid over after his death to the party entitled to the inheritance, unless the timber, though decaying, is for the defence and shelter, or ornament, of a mansion house (*q*). And where timber fit to be cut is felled by tenant for life for the benefit of the estate, the person next in remainder may elect to treat the timber as law-

(*l*) 2 Roll. Abr. WASTE (C). Co. Litt. 53. Bac. Abr. (WASTE).

(*m*) *Bateman* v. *Hotchkin*, 32 Law J., Ch. 6. *Bagot* v. *Bagot*, 2 N. R. 297.

(*n*) *Aubrey* v. *Fisher*, 10 East, 446.

(*o*) 2 Roll. Abr. 815, 817, *Gage* v. *Smith*, Godb. 210, pl. 298; 1 Inst. 53a.

(*p*) Ib. 53b. *Foley* v. *Wilson*, 11 East, 56.

(*q*) *Burges* v. *Lamb*, 16 Ves. 182. *Berwick* v. *Whitfield*, 3 P. Wms. 267. *Field* v. *Brown*, 27 Beav. 90.

fully cut, and require the value of it to be invested in land, and held as part of the estate, the tenants for life taking the interest of the fund, and the first owner of the inheritance, or tenant for life without impeachment for waste, taking the capital (*r*).

Waste by taming and reclaiming deer.—In the old books, the feeding of deer is declared to be waste where the deer have always been kept on the estate in a wild state, for wild deer go with the land to the heir-at-law, whereas, if they are fed and reclaimed, they cease to be animals *feræ naturæ*, and become personal property, and are severed from the freehold, and go to the executor; and it is this alteration in the nature of the property which makes the taming of the wild animal waste. But wild deer which have never been fed are seldom to be met with in England at the present day (*s*).

Equitable waste.—Where tenant for life holds without impeachment for waste he may nevertheless be restrained from committing what is termed equitable waste, which consists in doing acts of destructive injury to the property, to the detriment of the parties entitled in remainder. The term "without impeachment of waste," contained in a deed or will creating a life estate in land, does not enable the life tenant to deal with the property as if he was the absolute owner thereof in fee simple. He may cut down timber and growing trees fit for timber (*t*), and convert them to his own use (*u*), and open new mines, and work them for his own benefit, but he cannot dig and carry off brick-earth, and destroy a field, to the prejudice of the inheritance (*x*); and he will be restrained from committing wanton and malicious waste, such as damaging and destroying buildings, pulling down ancient boundary walls and fences (*y*), and cutting down thriving wood unfit for timber, and the felling of which would be destructive to the property (*z*); also from cutting down trees which were either planted or left standing for the shelter or ornament of a mansion-house (*a*). But he is not responsible, even in equity, although he allows a mansion-house and buildings to go to wreck and ruin for want of timely repairs to the roofs and windows (*b*), nor if he pulls down a ruinous structure, and uses up the materials in rebuilding it (*c*).

(*r*) *Phillips* v. *Barlow*, 14 Sim. 263. *Gent* v. *Harrison*, Johns. & H. 519. 29 Law J., Ch. 68.

(*s*) *Ford* v. *Tynte*, 31 Law J., Ch. 177.

(*t*) *Smythe* v. *Smythe*, 2 Swanst. 251. *Gordon* v. *Woodford*, 29 Law J., Ch. 222.

(*u*) *Pyne* v. *Dor*, 1 T. R. 56.

(*x*) *London (Bishop of)* v. *Web*, 1 P. Wms. 528.

(*y*) *Aston* v. *Aston*, 1 Ves. sen. 265. *Vane* v. *Lord Barnard*, 2 Vern. 739; Co. Litt. 220a. *Duke of Leeds* v. *Ld. Amherst*, 14 Sim. 357.

(*z*) *Chamberlayne* v. *Dummer*, 1 Bro. Ch. C. 160; 3 ib. 548.

(*a*) *Micklethwait* v. *Micklethwait*, 26 Law J., Ch. 721. *Wellesley* v. *Wellesley*, 6 Sim. 497. *Burges* v. *Lamb*, 16 Ves. 174.

(*b*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448. *Lansdowne* v. *Lansdowne*, 1 Jac. & Walk. 522, overruling *Parteriche* v. *Powlett*, 2 Atk. 383.

(*c*) *Morris* v. *Morris*, 3 De Gex. & J. 323.

Tenant in fee simple subject to an executory devise over, will also be restrained from committing that sort of destructive injury to property which is called equitable or malicious waste, but he is entitled to commit ordinary waste, such as cutting timber, not being ornamental timber, unless he is restrained by the will creating his estate from cutting down timber of any kind (*d*).

Lessee for term of years without impeachment of waste may be restrained at the instance of the reversioner from digging and carrying away brick-earth, as it destroys the field and causes lasting injury to the inheritance (*e*).

The words "without impeachment of waste," as applied to trustees of a term for special purposes, has a very different sense from the same words annexed to a tenancy for life. The Court of Chancery will not permit trustees so holding to execute their trust by cutting down timber; but, at common law, trustees without impeachment of waste cannot be made responsible for cutting timber (*f*).

Waste by trustees.—The Court of Chancery will grant an injunction to prevent trustees from cutting down ornamental timber; and if trees are felled by their orders, without the consent of the parties interested in the property, the trustees are bound to show that the cutting of them was absolutely necessary (*g*).

Parties having only an equitable interest in land.—When the legal estate in land is vested in trustees, and the equitable tenant for life is in possession of the land, it is the duty of the trustees to exercise their legal powers for the prevention of waste (*h*), but the Court of Chancery never holds trustees responsible for suffering permissive waste for want of repairs. "I can foresee," observes Wood, V. C. "no end to the demand which would be made upon trustees by remaindermen coming into possession of the trust property who might not think it sufficiently repaired, if they might say to the trustees, 'It was your duty to look after the tenant for life; you had the legal estate, and it was your business to see that he was doing all necessary repairs; and, as you have not done so, we shall fix you with the liability'" (*i*).

The Court of Chancery does not in general interfere to prevent permissive waste; it will not compel tenant for life to repair, but an account for dilapidations will be decreed against an incumbent (*k*).

Ecclesiastical dilapidations.—By the common law, the incumbent of a living is bound not only to repair the buildings belonging to his benefice,

(*d*) *Blake* v. *Peters*, 31 Law J., Ch. 889. *Turner* v. *Wright*, 29 ib. 470; Johns. 740; 2 De G. F. & G. 234.

(*e*) *Bishop of London* v. *Web*, 1 P. Wms. 527.

(*f*) *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 115.

(*g*) *Campbell* v. *Allgood*, 17 Beav. 627.

(*h*) *Pugh* v. *Vaughan*, 12 Beav. 517.

(*i*) *Powys* v. *Blagrave*, Kay, 506; 4 De G. M. & G. 448.

(*k*) *Powys* v. *Blagrave*, Kay, 490.

but also to restore and rebuild them when necessary, for the revenues of the benefice are given as a provision not merely for the clergyman himself personally, but for keeping up a suitable residence for the incumbent, and also for the maintenance of the chancel; and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund for obtaining the means of replacing them. But the liability of the incumbent to repair and rebuild extends only to that which is useful; he is not bound to restore or replace anything in the nature of ornament, such as white-washing, papering, and painting, except where painting is necessary to preserve exposed timbers from decay. His liability, therefore, in respect of the preservation and maintenance of buildings extends further than that of a tenant for term of years, who is not bound, as we have seen, to rebuild where he does not hold under a covenant to repair (*l*).

His power and dominion over the property, also, extends further than that of tenant for term of years; for an action for dilapidations cannot be maintained against him for pulling down old buildings, and erecting new structures, provided they are found by a jury to be more convenient and beneficial to the living, and it appears that the evidence of title is in nowise impaired, and no increased burthen is imposed upon the property (*m*).

As regards the cultivation and management of the glebe land of the living, that which would be waste when committed by tenant for life, or lessee for term of years, will not be so considered in the case of the incumbent of a living; for if you apply to a parson's glebe the same law that prevails between lessor and lessee, and tenant for life and reversioner, the course of husbandry and cultivation must remain the same for all time. What is once arable or pasture must always continue so; and no rector or vicar could effect agricultural improvements by employing any part of his glebe in any other manner than he found it employed. The court, therefore, will not restrain an incumbent from ploughing up meadow land when it is shown that a great improvement would be thereby effected, and the permanent value of the rectory, in a pecuniary point of view, be thereby increased (*n*).

A rector may cut down timber for the repairs of the parsonage-house or the chancel, but not for any common purpose. If it is the custom of the country, he may cut down underwood for any purpose, but if he grubs it, except in furtherance of a manifest improvement, it is waste. He may cut down timber, likewise, for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses

(*l*) *Wise* v. *Metcalfe*, 10 B. & C. 313, ante, p. 192.
(*m*) *Huntley* v. *Russell*, 13 Q. B. 572.
(*n*) *Duke of St. Albans* v. *Skipwith*, 8 Beav. 354.

belonging to the parsonage, but he cannot cut down timber except in these instances (*o*); nor can he open mines without the consent of the patron and ordinary (*p*); but he may work mines which were open and in existence at the time he came into possession of the property, and formed part of the annual profits thereof.

Waste by copyholders.—By the general custom of copyholds, if a copyholder commits waste, it is a forfeiture of his estate; and as such penal consequences are attached to this description of tort, the law requires clear proof of some invasion on the part of the tenant of the lord's property, or some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity (*q*). The pulling down of an old ruinous barn by a copyholder, without the license of the lord, is, in strictness of law, waste, and works a forfeiture of the copyhold estate; but if no real injury has thereby been done to the inheritance, the penal consequences of waste do not attach, and there is no authority for saying that any act can be waste, so as to work a forfeiture which is not injurious to the inheritance; either, first, by diminishing the value of the estate; secondly, by increasing the burthen upon it; or, thirdly, by impairing the evidence of title (*r*).

Tenants in common.—If one tenant in common misuses property which he holds in common with another, he is answerable to the other in an action for misfeazance; but he is not responsible in an action for waste for felling timber trees fit to be cut, or for opening mines, or taking any of the fair profits of the common property; but the other tenant in common will be entitled to recover a moiety of the value of whatever is severed from the freehold and converted into a chattel (*s*).

Waste from the removal of fixtures.—"Questions respecting the right to what are ordinarily called fixtures," observes Lord Ellenborough, principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance, viz. between his heir and executor. In this first case, *i. e.* between heir and executor, the rule as to severance obtains with the most rigour in favour of the inheritance and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto (*t*). Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the

(*o*) *Strachy* v. *Francis*, 2 Atk. 217. *Duke of Marlborough*, v. *St. John*, 5 De Gex. & Sm. 179.

(*p*) *Holden* v. *Weekes*, 1 Johns. & Hem. 278; 30 Law J., Ch. 35.

(*q*) Burton's Real Property, 411 (1335), ed. 1830.

(*r*) *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 517.

(*s*) *Martyn* v. *Knowles*, 8 East, 145.

(*t*) *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 Law J., C. P. 97.

greatest latitude and indulgence have always been allowed in favour of the claim of severance, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant" (*u*).

As between heir and executor, the rule is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a very early period, had several exceptions engrafted upon it in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. And it was laid down that if a lessee for years erect a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term (*x*). And as between the executor and the heir-at-law, it has since been held that where a fixed instrument, engine, or utensil, or a building covering machinery, is accessory to matter of a personal nature, then it shall itself be considered personalty, and belong to the executor, such as a fire-engine accessory to the carrying on the trade of getting and vending coals; or a brew-house furnaces and coppers, or a cider-mill, or varnish-house; but salt-pans connected with salt-springs, and erected for the benefit of the inheritance, and barns and agricultural buildings, erected for farming purposes, are not by the common law removable by executors, but belong to the heir (*y*).

The cases regarding the right of removal of fixtures, as between the executor of a tenant for life and the remainderman, will be found to turn each on its own peculiar circumstances; the character of the fixture, the use made of it, the mode of its attachment to the freehold, the facility of severance, the injury to the freehold by severance, and, in regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and the purpose for which it was attached. A building erected by an incumbent, which is in itself mere matter of luxury and ornament, which it would be a burthen to the benefice to keep up, and which the incumbent might have pulled down if he thought fit, and which may be detached without injury to the freehold, passes in general as part of the personal estate to the executors of the deceased incumbent, and may be taken away by them (*z*).

The right to remove fixtures, without incurring liability for waste, is considered at length in many learned treatises (*a*), and the remainder of the present chapter will be confined to the consideration of fixtures that

(*u*) *Elwes* v. *Maw*, 3 East, 53.
(*x*) Ib. 20 Hen. 7, 13a. b.
(*y*) Ib. 2 Smith's L. C. 128–160, 4th edit.
(*z*) *Martin* v. *Roe*, 7 Ell. & Bl. 248.
(*a*) Amos & Ferrard on Fixtures; Grady on Fixtures.

have been held removable, or irremovable, as between landlord and tenant.

Landlord's fixtures.—The term "landlord's fixtures" means such things as the landlord chooses to annex to the freehold and demise with it, and which, of course, the tenant has no right to remove, and must restore at the end of the term: such as grates, marble chimney-pieces, locks, keys, bars and bolts, steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, &c. (*b*).

Tenant's fixtures.—The rule formerly was, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it. One has been in favour of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these, it is to be observed that they are exceptions only (*c*). Other exceptions have been grafted upon the rule in favour of the enjoyment of the occupation, and in favour of trade, and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade. If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term. Whether a particular or fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise (*d*). Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold (*e*); also barns and beast-houses, waggon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending waggons and carts, and agricultural buildings employed and used upon the farm, and let into the ground; and not merely placed on the surface thereof, or on a brick or stone floor (*f*); also conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up, he is guilty of waste (*g*). But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, such as a windmill, a pump, a Dutch barn or granary, a pigeon or fowl-house, or a conservatory, and the superstructure merely rests on this foundation, or is attached thereto by screws

(*b*) *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 Law J., C. P. 97.

(*c*) *Buckland* v. *Butterfield*, 4 Moore, 447.

(*d*) *Elliott* v. *Bishop*, 10 Exch. 202.

(*e*) *Leach* v. *Thomas*, 7 C. & P. 327.

(*f*) *Elwes* v. *Maw*, 3 East, 38; 2 Smith's L. C. 128–160. *Wood* v. *Hewett*, 8 Q. B. 913.

(*g*) *Buckland* v. *Butterfield*, 4 Moore, 440; 2 B. & B. 54. *Jenkins* v. *Gething*, 2 Johns. & H. 520. *Syme* v. *Harvey*, 24 Sc. Sess. Cas. 502. *Sleddon* v. *Cruikshank*, 16 M. & W. 71; 16 Law J., Exch. 61.

or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the foundation belongs to the landlord, as part and parcel of the land, and the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease (*h*). A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold (*i*); nor a mooring-pile, driven into land for the accommodation of the navigation of a canal or river (*k*). But locks, keys, and bars belong to the landlord; and so does a shutter and sliding bolt, put up for the security of the premises.

Agricultural tenants' fixtures made removable by statute.—By 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall, with the consent in writing of the landlord, at his own cost and expense, erect any building, engine, or machinery, for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned.

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them, in the erection, with those furnished by the landlord (*l*).

Ornamental fixtures.—The ornamental fixtures now held severable and removable by the tenant are, chimney-glasses, pier-glasses, ornamental chimney-pieces, and stoves, tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels (*m*), and ornamental cornices capable of being detached without injury to the building (*n*).

Domestic and trade-fixtures.—Amongst the various domestic and trade-fixtures held to be removable by the tenant are, gas-pipes and gas-fittings, and water-pipes attached to buildings by metal bands and nails, grates, ranges, ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, &c. (*o*), soap-boilers' furnaces, fat-vats, coppers, dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans (*p*); also

(*h*) *Grymes* v. *Boweren*, 4 M. & P. 143; 6 Bing. 437. *Rex* v. *Otley*, 1 B. & Ad. 161. *Wansbrough* v. *Maton*, 4 Ad. & E. 884. *Davis* v. *Jones*, 2 B. & Ald. 165. *Rex* v. *Londonthorpe*, 6 T. R. 377. *Wiltshear* v. *Cottrell*, 22 Law J., Q. B. 181.

(*i*) *Wood* v. *Hewitt*, 15 Law J., Q. B. 247.

(*k*) *Lancaster* v. *Eve*, 5 C. B., N. S. 726.

(*l*) *Smith* v. *Render*, 27 Law J., Exch. 83.

(*m*) *Beck* v. *Rebow*, 1 P. Wms. 94.

(*n*) *Avery* v. *Cheslyn*, 3 Ad. & E. 75.

(*o*) *Wall* v. *Hinds*, 4 Gray's Amer. Rep. 272. *Elliott* v. *Bishop*, ante, p. 202.

(*p*) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24. *Poole's* case, 1 Salk. 368. *Lawton* v. *Lawton*, 3 Atk. 13. *Penton* v. *Robart*, 2 East, 90.

machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade-fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam-engine, or machinery, or trade utensils, from the effect of the weather, it may be removable, together with the trade-fixture to which it belonged, on the ground that "omne accessorium sequitur suum principale." But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums, and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory (*q*).

Fixtures removable by local custom and usage.—Things annexed to the freehold are sometimes held removable, in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber (*r*). And if the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom (*s*).

Abandonment of the right to disannex and remove ornamental and trade-fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, "all erections and buildings that may be erected," or "all improvements that may be made," upon the demised premises, he cannot afterwards remove trade-erections, or buildings, or trade or ornamental or domestic fixtures (*t*). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterwards put up by the tenant (*u*).

(*q*) *Whitehead* v. *Bennett*, 27 Law J., Ch. 474.

(*r*) 11 Vin. Abr. 154. EXECUTORS U. pl. 74. *Culling* v. *Tuffnell*, Bull, N. P. 34.

(*s*) 2 Smith's L. C. p. 145, 4th edit.

(*t*) *Naylor* v. *Collinge*, 1 Taunt. 19. *Thresher* v. *E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62. *Martyr* v. *Bradley*, 2 M. & Sc. 25; 9 Bing. 24. *West* v. *Blakeway*, 3 Sc. N. R. 218. *Elliott* v. *Bishop*, 10 Exch. 520.

(*u*) *Hitchman* v. *Walton*, 4 M. & W. 414. *Metrop. Co. Ins. Soc.* v. *Brown*, 28 Law J., Ch. 581.

Inability of the tenant to remove fixtures after the expiration of the term of hiring.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord, re-enter for the purpose of severing and removing fixtures. "After the term, they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the sufferance and permission of the landlord, and actually severs them and removes them during the continuance of his lawful possession, after the expiration of the term. If he holds over wrongfully, he loses his right to sever and remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner (*x*). If the lease becomes forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will, it is apprehended, be entitled to retain the fixtures so removed, as they are not forfeited to the landlord by the forfeiture of the lease (*y*).

Right of purchasers, or mortgagees, to enter and remove fixtures.—The right of the assignee of the lessee can of course, in general, extend no further than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender, "for, as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance" (*z*); and, therefore, if a lessee who has mortgaged his fixtures surrenders his term and quits possession, the mortgagee may nevertheless enter and remove the fixtures (*a*).

Waste committed by strangers upon land demised to a tenant or lessee.—Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to an action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester (ante, p. 192) "prohibiteth farmers from doing waste; and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it, 'Et qui non obstat quod obstare potest, facere videtur.' In this case the lessor shall

(*x*) *Leader* v. *Homewood*, 5 C. B., N. S. 546; 27 Law J., C. P. 316. *Ruffey* v. *Henderson*, 21 ib. Q. B. 49; 17 Q. B. 574. *Heap* v. *Barton*, 12 C. B. 274.

(*y*) *Stansfeld* v. *Mayor of Portsmouth*, 4 C. B., N. S. 131. But see *Storer* v. *Hunter*, 3 B. & C. 368.

(*z*) Co. Litt. 338b.

(*a*) *Lond. & West. Loan, &c. Co.*, 6 C. B., N. S. 798; 28 Law J., C. P. 297.

have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrong-doer" (*b*).

License to commit waste.—If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* per annum per acre, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth (*c*).

Right of reversioners to enter upon lands in the possession of their lessees to inspect waste.—The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages (*d*).

Injuries to lands and tenements from fire.— The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (ante, p. 195). Where the Countess of Shrewsbury brought an action against a lawyer of the Temple, and declared that she leased to him a house at will, "et quod ille tam negligenter et improvide custodivit ignem suum quod domus illa combusta fuit," it was held that the action was not maintainable, as it was in effect an action for permissive waste, for which a tenant-at-will was not answerable (*e*). Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house-property is exposed from fire and the negligence of servants intrusted with fire and candles (*f*); and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a

(*b*) 2 Inst. 146.
(*c*) *Attersoll* v. *Stevens*, 1 Taunt. 183.
(*d*) *Hunt* v. *Downman*, Cro. Jac. 478.
(*e*) *Countess of Shrewsbury* v. *Crompton*, 5 Co. 13b; Cro. Eliz. 777; Tindal, C. J., 4 M. & Sc. 253. *Horsefall* v. *Mather*, Holt, N. P. C. 9.
(*f*) Fortuna autem ignis, vel hujusmodi eventus inopinati, omnes tenentes excusat. Fleta, lib. i. cap. 12. s. 20.

wilful act, the party guilty of the misconduct, whether it be the tenant or a stranger to the demise (post, p. 209), will be answerable for commissive waste. And, although a lessee coming into possession of houses and buildings under a contract with a lessor, who might, if he thought fit, have taken security against damage from fire, is not responsible to such lessor for fire caused by involuntary and unintentional neglect, yet, if a fire, originating in negligence, spreads from the demised premises to other buildings of the lessor, or to the buildings of strangers, the lessee will be responsible for the damage done to them (*g*).

Every person who puts a dangerous thing in motion which causes injury to another, is, as we have seen, in general responsible for the mischief it occasions (*h*). Where a man shooting with a gun at a fowl hit his own house and set it on fire, and the fire spread to the house of his neighbour and destroyed it, it was held that the firer of the gun was responsible for the damage, although the fire was occasioned rather by an accident or misadventure than by negligence (*i*).

Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbours as regards the safe keeping of such fire. By the ancient custom of the realm, "quilibet homo et fœmina ignem suum, die et nocte, salve et secure custodire teneatur, ne pro defectu debitæ custodiæ ignis hujusmodi damnum aliquod vicinis suis eveniat" (*k*). It was formerly holden that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbour's house, that he in whose house the fire first happened was liable to an action on the case on this general custom of the realm (*l*). In Rolle's Abridgement it is said: "If my fire by misfortune burns the goods of another man, he shall have an action on the case against me. If the fire lights suddenly on my house, I knowing nothing of it, and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me. If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbour, action on the case lies against me by him; and the law is the same if my guest should do it, or a person who enters my house with my leave or knowledge" (*m*). "But if a man out of my house, against my will, puts fire into the straw of my house or elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them, &c., for that cannot be said to be by malfeazance on my part, but against my will" (*n*).

(*g*) *Panton* v. *Isham*, 3 Lev. 359.
(*h*) Grose, J., 3 East, 600.
(*i*) Anon. Cro. Eliz. 10. Ante, p. 2.
(*k*) Rastr. Entr. p. 18. *Panton* v. *Isham*, 3 Lev. 356.
(*l*) Bac. Abr., Actions on the Case F., p. 104.
(*m*) 1 Roll. Abr., Action sur Case B. Danvers Abr. 10.
(*n*) Markham, J., *Beaulieu* v. *Finglam*, 2 H. 4, fol. 18, pl. 6.

But although the master of a house, or the raiser of a fire, was clothed with this extensive responsibility as regarded the lighting, safe-keeping, and spreading of such fire, yet if the fire spread by reason of the act of God, or from some superior cause which could not have been prevented, controlled, or resisted by human agency, the master of the house, or the lighter of the fire, was held excused. Thus, where the defendant's servant kindled a fire in the defendant's field in the way of husbandry, and in the ordinary course of his employment as a farm-servant, and the wind drove the fire into an adjoining heath and coppice of the plaintiff, and set it on fire, it was held that if the defendant could have shown that the spreading of the fire had been occasioned by a sudden storm, which could not have been foreseen, guarded against, or controlled by human agency, that would be good evidence to excuse the defendant (*o*). To put the law on a proper footing, by rendering the party responsible only on proof that the fire was occasioned by the actual negligence of himself or his servant (*p*), it was enacted by the statute, 6 Anne, c. 31, ss. 6, 7, that no action or suit shall be maintained against any person in whose house or chamber any fire shall *accidentally* begin, or any recompense be made by such person for any damage occasioned thereby. This statute has been repealed by 12 Geo. 3, c. 73, s. 46, and the protection extended (s. 37; 14 Geo. 3, c. 78, s. 86) to all persons in whose stable, barn, or other building, or on whose ESTATE any fire shall *accidentally* begin; but no contract between landlord and tenant is to be defeated or made void.

It was thought for a long time that the word "accidental" was employed in these statutes in contradistinction to wilful, and that the same fire might be said to begin accidentally, and yet be the result of a certain amount of negligence; but it has been recently held that these statutes refer only to fires produced by mere chance, or which are incapable of being traced to any cause, and so stand opposed to the negligence of either servants or masters, and that they do not, consequently, protect parties from the ordinary common-law responsibility in respect of fires occasioned by negligence (*q*). Thus, where the occupier of a meadow adjoining some cottages belonging to the plaintiff stacked a hay-rick on the extremity of the meadow in too green a condition, close to the plaintiff's cottages, and the hay smoked, and steamed, and exhibited unequivocal symptoms of approaching combustion, and the defendant was frequently warned of the danger of the stack's taking fire, and said that he would "chance it," but he ultimately caused a hole to be cut through the centre of the rick, which, unfortunately, hastened the catastrophe it was intended to avert,

(*o*) *Turbervil* v. *Stamp*, 1 Salk. 13; 1 Ld. Raym. 264.

(*p*) *Ld. Canterbury* v. *the Queen*, 1 Ph. C. C. 318; 12 Law J., Ch. 284.

(*q*) *Filliter* v. *Phippard*, 11 Q. B. 357. *Canterbury* (*Visct.*) v. *Att.-Gen.* 1 Phil. Ch. c. 328.

and the hay-stack caught fire, and the fire spread to the barn and stables of the defendant, and thence to the plaintiff's cottages, and totally consumed them, it was held that the defendant was responsible for the destruction of the cottages, and that, in cases of this sort, "it is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man" (*r*).

It has been held, also, that these statutes respecting accidental fires do not apply where the fire originates in the use of a dangerous engine or instrument, knowingly used by the owner of the land or estate on which the fire breaks out; so that if the owners of manufactories and steam-engines are guilty of any negligence or carelessness in the management of their furnaces and chimneys, and by reason thereof sparks escape and are blown on to the adjoining buildings, the owners of the furnace will be responsible for the damage done. It has been held, moreover, that a fire designedly lighted by the defendant or by his orders, on his own estate, and which afterwards spreads, and causes damage to the plaintiff, is not a fire which "accidentally begins" within the meaning of the statute; so that if a person lights, or causes his servants to light, fires on his land, for the purpose of burning weeds and rubbish, and the fire spreads to and destroys the hedges and woods or cornfields of the adjoining landed proprietor, the lighter of the fire will be responsible for the damage (*s*). But a fire may be knowingly and designedly lighted in the first instance, and yet may fairly be said to "accidentally begin" the moment that, through some sudden and unexpected wind, the fire spreads, or sparks and fragments of fire are blown into the air, and get beyond the control of the party who has lighted and watched the fire (ante, p. 208).

Fire spreading from blast-furnaces and steam-engines.—Wherever it is practicable to adopt precautions that will render damage by fire from a furnace "next to impossible," a failure to adopt those precautions will be negligence. Where a spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cart-lodge, and set it on fire, and the fire communicated to several other farm-buildings, and totally destroyed them, it was held that the very occurrence of the disaster was, *primâ facie*, proof of negligence on the part of the company and their servants, having the management of their engine, rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks (*t*).

Fire spreading from railways to the adjoining property.—If railway

(*r*) *Vaughan* v. *Menlove*, 4 Sc. 251; 3 Bing. N. C. 468.

(*s*) *Filliter* v. *Phippard*, 11 Q. B. 347. *Turbervil* v. *Stamp*, 1 Salk. 13.

(*t*) *Piggot* v. *Eastern Co. Rail. Co.*, 3 C. B. 229. *Aldridge* v. *Gt. West. Rail. Co.*, 3 M. & Gr. 515. *Fremantle* v. *Lond. & North-West. Rail. Co.*, 10 C. B., N. S. 89; 31 Law J., C. P. 12; 2 F. & F. 337.

companies allow quantities of long, dead grass, or any other combustible material, dangerously to accumulate along their railway, and the combustible matter is ignited from lighted coals or sparks escaping from their locomotive engines, and the fire spreads from the railway to the adjoining coppices and fires them, the railway company will be responsible for the damage done, for such a fire is not a fire which accidentally begins on their estate, but is a fire caused by their negligence in not keeping the railway free from combustible materials likely to be ignited by their furnaces, and to cause damage to their neighbours. They may be expressly authorized by statute to use locomotive furnaces of a dangerous character, but no statute can exempt them from the consequences of negligence in the management of their railways, or the construction of their fire-boxes, chimneys, or furnaces, or authorize them to throw coals of fire on the adjoining property. If they neglect to avail themselves of all such contrivances as are in known practical use to prevent the emission of sparks from their engines, they will be responsible for such neglect (*u*).

Fires occasioned by the negligence of servants.—The statutes 6 Anne, c. 13, s. 3, and 12 Geo. 3, c. 73, s. 35, impose penalties upon servants who, through negligence or carelessness, fire any houses or buildings; but the enactment does not exempt the master from responsibility for the negligent acts of the servant whilst carrying into execution the master's orders (*x*).

Amongst the Romans, where fire was little used, and candles were unknown, it was considered that damage from fire seldom occurred without imprudence or negligence, and those through whose neglect, however slight, a fire occurred, were held answerable for the damage done by it (*y*).

Injuries from gunpowder and explosive substances—Explosions of gas.—Whoever introduces gunpowder or explosive materials into a building is responsible for damage occasioned by the introduction of such dangerous substances. If a person mixes things together, which alone are perfectly innocent, but which are liable to explode on coming into contact, he is responsible for the consequences; and if an explosion ensues he must make good the damage (*z*). Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the

(*u*) *Fremantle* v. *Lond. & North-West. R. Co.*, ut sup. *Vaughan* v. *Taff Vale Rail. Co.*, 3 H. & N. 743; 28 Law J., Exch. 41; 29 Law J., Exch. 247; 5 H. & N. 679.

(*x*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468.

(*y*) Domat. liv. 2, tit. 8, s. 4.

(*z*) Tindal, C. J., 4 Sc. 252.

tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street (*a*). In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main" (*b*).

SECTION II.

REMEDIES AT COMMON LAW FOR INJURIES TO LANDS FROM WASTE, NEGLIGENCE, AND FIRE.

The writ of prohibition for waste was anciently a common-law remedy, grantable only at the instance of the party injured, but by the statute of Westminster the second (13 Ed. 1, c. 14), this writ is taken away, and a writ of summons substituted in its place; "and although it is said by Lord Coke, when treating of prohibition at the common law, that it may be used at this day, those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the *posse comitatus* to prevent the commission of intended waste" (*c*).

Actions for waste.—The real action for waste in which the land or tenement itself was recovered, with thrice as much as the waste was taxed at, has been abolished by 3 & 4 Wm. 4, c. 27, s. 36, and the remedy at common law is now by the ordinary action on the case, in which the actual damage sustained may be recovered, and an injunction obtained to prevent the continuance or repetition of the mischief (*d*).

Actions by owners of insured premises.—The right of the owner of real property, which has been damaged or destroyed by fire, caused by rioters or by negligence, to sue the wrong-doer for damages, is not affected by the fact of his having insured the property, and received from an insurance company full indemnity for his loss (*e*), but he sues in the character of a trustee for the insurer, and is bound to hand over the damages he recovers

(*a*) *Holden* v. *Liv. Gas Co.*, 3 C. B. 14; 15 Law J., C. P. 304.

(*b*) *Blenkiron* v. *Gt. Central, &c.*, 2 F. & F. 438.

(*c*) *Jefferson* v. *Bishop of Durham*, 1 B. & P. 121.

(*d*) Post, ch. 23, s. 1.

(*e*) *Yates* v. *Whyte*, 5 Sc. 640; 4 Bing. N. C. 272.

to the latter. And an insurer, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering full compensation from the wrong-doer (*f*).

Parties to actions for waste.—An action for waste in houses and buildings must in general be brought by the party entitled to the immediate estate in remainder ; but if tenant for life commits waste, and the first remainderman dies, the party next entitled may sue for the damage (*g*), if he had a vested interest in remainder at the time the waste was done (*h*). When the party next in remainder has only a life interest, his right to recover damages is of course confined to the injury done to his limited interest (*i*). Where timber has been wrongfully felled on an estate by a tenant for life, or person having a limited interest, the first owner of the inheritance is entitled to maintain an action for the conversion of the timber as a chattel severed from the inheritance, passing over all the intermediate limited estates (*k*), for the property in the timber must be in some one as soon as the wrongful act is done, and the law therefore vests it in the first owner of the inheritance (*l*).

In cases of injuries from fire caused by the negligence of a neighbour, who has carelessly lighted a fire on his own land, which has spread to a demised tenement and injured it, the landlord is entitled to sue for the damage done to his inheritance, and the tenant for the injury to his possession and occupation (*m*). We have already seen that, when several persons have a joint interest in the property, as occupiers or reversioners, they ought all to be made plaintiffs in an action for an injury to the property (*n*); and that when several persons have been jointly engaged in the doing of the wrongful act, the plaintiff may sue one or more of them at his election (*o*).

Declarations for waste should set forth the defendant's possession and occupation of a messuage, tenement, or land, of which the reversion is in the plaintiff, and the wrongful commission by the defendant of the particular description of waste complained of, averring that, by means of the wrongful act, the plaintiff is greatly injured in his reversionary estate, and claiming damages (*p*). If the tenant has severed and removed things attached to the freehold ; if he has dug up and carried away virgin soil, stone, or gravel, without the license of the landlord or reversioner, or has severed and removed landlord's fixtures, the things so severed forthwith

(*f*) *Randal* v. *Cockran*, 1 Ves. sen. 97 ; post, ch. 22, s. 1.
(*g*) *Bray* v. *Tracy*, Cro. Jac. 688. *Paget's* case, 5 Co. 76b.
(*h*) *Bacon* v. *Smith*, 1 Q. B. 348.
(*i*) *Evelyn* v. *Raddish*, ante, p. 59.
(*k*) *Bowles's* case, 11 Rep. 79b.
(*l*) Wood, V. C., *Gent* v. *Harrison*, Johns. 524; 29 Law J., Ch. 68.
(*m*) *Panton* v. *Isham*, 3 Lev. 359; 1 Salk. 19. Ante, p. 168.
(*n*) Ante, pp. 54, 169.
(*o*) Ante, pp. 122, 171; and post, ch. 20.
(*p*) *Martyr* v. *Bradley*, 9 Bing. 24. *Young* v. *Spencer*, 10 B. & C. 145. *Martin* v. *Gilham*, 7 Ad. & E. 540; 2 Wm. Saund. 252.

vest in the landlord as chattels, and the latter may also declare either for a trespass or for a conversion of the property (*q*).

Declarations upon the custom of the realm for the negligent keeping of a fire show a good cause of action, by setting forth that the defendant, by his servant, lighted a fire on the defendant's land, and so negligently kept such fire that it extended from the defendant's land to the adjoining buildings, &c., of the plaintiff, and wholly destroyed them (*r*); or that the plaintiff was possessed of a close of land, closely adjoining a certain other close in the occupation of the defendant, and that the defendant wrongfully lighted a fire on his said close, at a time when, by reason of the state of the wind and weather, it was highly dangerous to light a fire, and that through the negligence of the defendant and his servants, the fire extended itself from the close of the defendant to the close of the plaintiff, and burnt and destroyed the trees, hedges, and fences, of the plaintiff, &c. (*s*).

A good cause of action also is disclosed by a declaration alleging that the plaintiff was possessed of farm-buildings and stacks of corn standing in a close in the occupation of the plaintiff, closely adjoining a certain other close in the occupation of the defendant, and that the defendant placed a stack of hay on his said close, which heated and smoked, and gave out a strong smell, indicating that the hay-stack was in danger of taking fire, of which the defendant then had notice, and that the defendant, knowing the dangerous condition of the hay-stack, nevertheless kept it on his said close, and knowingly caused it to be a source of danger to the adjoining property of the plaintiff, although he could have removed it, or prevented it from being dangerous; and that by reason of the defendant's default and negligence in the premises, the hay-stack ignited and burst into flame, and set fire to the adjoining farm-buildings of the plaintiff (*t*).

Pleas.—The plea of not guilty, and the evidence admissible thereunder, and special pleas in actions for waste, &c., are governed by the same rules as those previously set forth in actions for infringements upon territorial and incorporeal rights (*u*).

Evidence at the trial.—Proof on the part of the plaintiff in actions for waste must be directed to the establishment of the material facts alleged in the declaration, *i.e.* the defendant's tenancy of the land on which the waste was committed, the plaintiff's reversionary interest therein, the nature of the grievance, and the permanent injury thereby done to the inheritance, or to the plaintiff's proprietary rights as reversioner (ante,

(*q*) *Higgon* v. *Mortimer*, 6 C. & P. 616; post, ch. 7, s. 2.
(*r*) *Panton* v. *Isham*, 3 Lev. 359.
(*s*) *Filliter* v. *Phippard*, 11 Q. B. 348.
(*t*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468. *Aldridge* v. *Gt. West.*, 3 M. & Gr. 516. *Piggot* v. *East. Co. Rail. Co.*, 3 C. B. 229. *Vaughan* v. *Taff Vale Rail. Co.*, *Freemantle* v. *Lond. & North-West. Rail. Co.*, ante, p. 209.
(*u*) Ante, pp. 56, 125; and post, ch. 21.

pp. 54, 212). If the action is brought for permissive waste, the plaintiff must prove that the defendant is tenant for life, or that he has a permanent interest in the property permitted by him to go to waste and ruin (ante, pp. 168, 192); but if it is for commissive waste, the nature and duration of the defendant's interest in the property is wholly immaterial. If it be proved that the tenant left windows and doors open which ought to have been kept closed against storm and rain, or that panes of glass were broken, and that he allowed the windows to remain without glass, so that the rain, frost, and damp penetrated the building, and rotted the internal timbers and woodwork thereof, to the lasting damage of the inheritance, there will be evidence of commissive waste. If the plaintiff complains of the removal of doors and partitions in the house, he must show that the alterations made were of a permanent character, making a real change in the form and arrangement of the building, or that they deterioriated the property (ante, pp. 193, 194). If the cause of action is founded on the removal by the tenant of things attached to the freehold, it must be shown that the removal was wrongful; either on the ground that the things removed never did belong, or ceased to belong, to the defendant, or that they had become forfeited to the plaintiff (ante, pp. 200–205). If the plaintiff sues for damage from fire, he must show that the fire was lighted by the defendant or his servants, or that a fire was burning on the defendant's estate, and that it was so negligently managed, or was lighted so carelessly, that it extended to the plaintiff's buildings and destroyed them. It is not necessary to prove the legal duty to take care of a fire. If the action is brought by a lessor, it may, as we have seen, be defeated by proof of the tenancy between the plaintiff and the defendant (ante, p. 206).

Damages recoverable in respect of the severance and sale of fixtures.—Where fixtures have been unlawfully detached from the freehold and sold by auction, the measure of damages in an action against a wrongdoer for the seizure and removal of the fixtures is the value of the fixtures, as between an outgoing and incoming tenant, in addition to compensation for any intentional wrong, injury, or insult involved in the act of removal (*x*), or for any trespass that may have been committed in removing them.

Effect of the recovery of nominal damages.—In the old action of waste, where the thing wasted was sought to be recovered as well as damages, it was held that if the damages did not amount to 3*s.* 4*d.*, the defendant was entitled to judgment (*y*). "I do not," observes Lord Eldon, C. J., "see precisely on what ground these decisions proceeded; though I can easily conceive many cases in which it may be extremely unconscientious

(*x*) *Thompson* v. *Pettit*, 10 Q. B. 106.
(*y*) *Rigg* v. *Parsons*, cited 2 East, 155; Bull, N. P. 120.

for a plaintiff to take advantage of his judgment, where such small damages have been recovered." Therefore, where the owner of land suffered his tenant to expend a large sum of money in building upon the land, and laying out a garden without making any objection to the alteration and improvement, and then brought an action of waste on the statute, and the jury assessed the damages at one farthing, the court gave judgment for the defendant. But in an action on the case for waste, it is no objection to the landlord's claim to substantial damages, or to the judgment of the court, that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. Thus, if a tenant convert a furze brake in which game have bred into arable or pasture land, by which its real value is much improved, but the landlord has objected to the improvement, preferring a furze brake with game to a cornfield without game, the landlord is entitled to substantial damages (*z*), and to judgment, whatever may be the damages recovered (*a*).

Assessment of damages.—We have already seen that the damages in actions for injuries to real property must be assessed with reference to the several interests of the owners and occupiers, and be apportioned to each in respect of the injury sustained by each, and that the satisfaction made to one is no bar to an action brought by the other (ante, pp. 59, 178). Where, therefore, a house has been burned down, or destroyed by culpable negligence, and there are several parties interested in the property, viz. tenant for life, tenant in tail, and reversioner in fee, the tenant for life can recover only such damages as are commensurate with his life-estate (*b*). If a house demised to a tenant has been set on fire, or thrown down through the negligence of a neighbour, the damages are apportionable between the landlord and tenant. The tenant is entitled to recover in respect of the value of his possessory interest and unexpired term in the premises, and the landlord in respect of the injury to his reversion (*c*). But if the tenant is bound by covenant to keep the house in repair, the substantial injury would then accrue to the tenant, and the tenant would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new (*d*). The tenant, moreover, would be entitled to damages in respect of the loss he has sustained in being obliged to seek out and pay for another residence; but he could not recover the full value of the house (*e*).

When the action is brought for a breach of duty by the defendant, in omitting or neglecting to restore or rebuild a house which the defendant

(*z*) Heath, J., *Harrow School* v. *Alderton*, 2 B. & P. 86.
(*a*) *Pindar* v. *Wadsworth*, 2 East, 161.
(*b*) *Evelyn* v. *Raddish*, Holt, 543.
(*c*) *Panton* v. *Isham*, 3 Lev. 359; 1 Salk. 19.
(*d*) *Lukin* v. *Godsall*, 2 Peake, 15; post, ch. 14, s. 1.
(*e*) *Hosking* v. *Phillips*, 3 Exch. 182.

has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case, the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding (*f*).

The plaintiff's right to recover damages from the wrong-doer, in respect of the injury he has sustained, is not affected, as we have seen, by the fact of his having insured the property and being indemnified for the loss (*g*); but he cannot, as we shall presently see, recover a double satisfaction, but is bound to pay over to the underwriter of the policy the damages he recovers from the wrong-doer (*h*).

Damages recoverable from a tenant who obstructs the reversioner in the exercise of his right to enter upon the demised premises to inspect waste.—We have already seen that the law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore, if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done (*i*).

SECTION III.

OF INJUNCTION TO PREVENT WASTE.

Prevention of commissive or wilful waste by injunction.—The courts of chancery and of common law (*k*) will interfere by injunction to restrain lessees, tenants for life, mortgagors in possession, and parties having a limited interest in land, from committing waste thereon, to the injury of the landlord, mortgagee, or reversioner (*l*). It will restrain them from digging, or ploughing up, or destroying the surface of ancient pasture land, and from sowing the land with pernicious crops (*m*), from

(*f*) *Yates* v. *Dunster*, 11 Exch. 17; 24 Law J., Exch. 226. *Lukin* v. *Godsall*, 2 Peake, 15.

(*g*) *Clark* v. *Blything*, 2 B. & C. 254; ante, p. 216.

(*h*) Post, ch. 22, s. 1.

(*i*) *Hunt* v. *Dowman*, Cro. Jac. 478.

(*k*) As to injunction at common law, see post, ch. 23.

(*l*) Bac. Abr. (WASTE), N.

(*m*) *Worsley* v. *Stuart*, 4 Bro. P. C. 377. *Drury* v. *Molins*, 6 Ves. 328. *Pratt* v. *Brett*, 2 Mad. 62.

digging and carrying away brick-earth (*n*) and stones (*o*), cutting ditches, opening mines and quarries (*p*), and abusing a limited right to dig for and carry away stone (*q*), cutting turf (*r*), or timber (*s*), or underwood of insufficient growth (*t*), pulling down fences and buildings, and carrying away the materials (*u*), unless the wrongful act works a forfeiture of the estate, and the landlord or reversioner has an immediate right of entry, and fails to exercise the right by bringing an ejectment (*x*), or unless the parties have, by their contract, assessed the compensation in the shape of an increased rent or liquidated damages, to be paid for the doing of the act (*y*), and not as a cumulative remedy (*z*). Where a tenant from year to year received notice to quit, and then began to cut and damage the hedgerows, and to take manure off the land and remove straw, &c., contrary to the course of good husbandry, the court granted an injunction to stop the mischief (*a*). And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh mountains through his land, set to work to gather the minerals, and sell them, the court granted a perpetual injunction to restrain him from so doing (*b*).

Where there is tenant for life, remainder for life, remainder in fee, or where there is tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the Court of Chancery will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainderman before the time comes when the second tenant for life's power commences (*c*). And where there is tenant for life, remainder for life, remainder in fee, the court, on a bill brought by remainderman in fee to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction. And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance (*d*).

The court will also restrain, by injunction, a lessee for lives renewable

(*n*) *London* (*Bishop of*) v. *Webb*, 1 P. Wms. 528. *Viner* v. *Vaughan*, 2 Beav. 466.
(*o*) *Cowper* v. *Baker*, 17 Ves. 128.
(*p*) *Gibson* v. *Smith*, 2 Atk. 182.
(*q*) *Thomas* v. *Oakley*, 18 Ves. 184.
(*r*) *Coppinger* v. *Gubbins*, 9 Ir. Eq. 310.
(*s*) *Perrot* v. *Perrot*, 3 Atk. 94. *Packington's* case, ib. 215. *Morris* v. *Morris*, 15 Sim. 509.
(*t*) *Brydges* v. *Stephens*, 6 Mad. 279.
(*u*) *London* (*Mayor of*) v. *Hedger*, 18 Ves. 355.
(*x*) *Lathropp* v. *Marsh*, 5 Ves. 259.
(*y*) *Woodward* v. *Gyles*, 2 Vern. 119. *Carnes* v. *Nesbitt*, 7 H. & N. 778; 30 Law J., Exch. 348. *Rolfe* v. *Peterson*, 2 Bro. P. C. 436.
(*z*) *London* (*City of*) v. *Pugh*, 4 Bro. P. C. 395.
(*a*) *Onslow* v. ——, 16 Ves. 173.
(*b*) *Thomas* v. *Jones*, 1 Y. & C. N. R. 510.
(*c*) *Robinson* v. *Litton*, 3 Atk. 210.
(*d*) *Farrant* v. *Lovel*, 3 Atk. 722.

for ever from committing waste on the demised premises (*e*), and prevent one tenant in common from wilfully destroying the common property (*f*); but where a railway company obtained a lease from five out of six tenants in common, and laid down a railway on the land in spite of the opposition of the sixth, the court refused to grant an injunction to prevent the latter from tearing up the rails (*g*).

If one tenant in common thinks proper, by agreement with the other, to hold the common property as occupying tenant, and thereby excludes his co-tenant in common from all right of entry upon the land holden in common, an injunction will be granted to restrain him from dealing with the land otherwise than as an ordinary occupying tenant (*h*).

The patron of a living may also have an injunction against the incumbent to stay waste; and a bishop may be restrained from felling timber for sale at the instance of the attorney-general, on behalf of the crown, the patron of bishopricks (*i*). The patron is the proper party to institute a suit to restrain the opening and working of new mines, and he is the only person who can interfere, unless it be the ordinary, to prevent any collusion between the patron and the incumbent (*k*).

An injunction to restrain waste will be granted to protect the interest of a child in *ventre sa mère*, or a contingent remainderman or executory devisee (*l*).

If a tenant, finding his house ruinous and in danger of falling, proceeds to pull it down, with the intention of building a better, the landlord may, by injunction, restrain him from so doing, as the tenant has no right, as we have seen (ante, p. 193), to make changes and alterations in the property demised to him without the landlord's consent (*m*).

The Court of Chancery does not now treat questions of destructive damage to property exactly as it did forty or fifty years back; its protection in such respect being more largely afforded than it then generally was (*n*). "The arm of the court," it has been said, "is long enough to reach clear cases of destructive waste, even where the party committing such waste is in possession, and the party seeking to restrain the acts of waste is out of possession, and his title is denied by the defendant (*o*). Where, therefore, an action of ejectment has been brought, the court will, at the instance of the plaintiff in the action, restrain the party in possession of the property from recklessly cutting down vast quantities of timber, or denuding the estate of trees, or committing acts of waste and de-

(*e*) *Purcell* v. *Nash*, 1 Jones, 625.
(*f*) *Hole* v. *Thomas*, 7 Ves. 589.
(*g*) *Durham & Sund. Rail. Co.* v. *Wawn*, 3 Beav. 119.
(*h*) *Twort* v. *Twort*, 16 Ves. 128.
(*i*) *Knight* v. *Mosely*, Amb. 176. *Wither* v. *Dean, &c. of Winchr.*, 3 Mer. 427. *Duke of Marlborough* v. *St. John*, ante, p. 200.
(*k*) *Holden* v. *Weekes*, ante, p. 200.
(*l*) *Robinson* v. *Litton*, 3 Atk. 211; 2 Daniel's Ch. Pr. 1225.
(*m*) *Smyth* v. *Carter*, 18 Beav. 78.
(*n*) *Haigh* v. *Jaggar*, 2 Coll. Ch. C. 231.
(*o*) V. C. Wood, *Talbot* (*Earl of*) v. *Scott*, 4 Kay & J. 108.

struction inconsistent with any fair or reasonable exercise of acts of ownership (*p*). And where waste is committed by a stranger in collusion with the tenant, the court will, at the instance of the landlord, grant an injunction against such stranger, as well as against the tenant (*q*). But the court never interposes in the case of permissive waste, either to prohibit or to give satisfaction, as it does in the case of wilful waste (*r*).

An injunction will be granted against waste when it is done only in a slight degree, or when threatened; but not on the principle that it will do no harm to the defendant, if he does not intend to commit the prohibited act (*s*).

The court also will prevent one of several partners from doing acts tending to depreciate the value of the partnership property, and injuring the credit of the firm (*t*); and from disposing of the joint stock to his own private purposes, in fraud of his co-partner (*u*).

Effect of acquiescence in the commission of waste.—It is a principle of equity, that when a person has stood by seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorized or permitted. Thus, where the plaintiff had demised a logwood-mill to the defendant, and the latter altered it to a cotton-mill of great value, and the plaintiff stood by and saw the cotton-mill erected at great expense, and made no objection, and afterwards approved of the defendant's planting about the mill, and the plaintiff then filed a bill for an injunction to restrain the defendant from using the mill as a cotton-mill, the court dismissed the bill, on the ground that the plaintiff had by his conduct encouraged the defendant to make the alteration (*x*).

Effect of laches or delay in seeking a remedy.—Where an expectant tenant for life in remainder sees a tenant for life in possession improperly cut timber, and not only takes no step to prevent it during his life but allows a long period of time to elapse after his death without seeking any redress, a court of equity will not, after this long lapse of time, charge the estate of the prior tenant for life with the burthen of making good the value of the timber so cut by him, for a court of equity is averse to the assertion of stale demands (*y*).

Parties entitled to sue in equity.—By 15 & 16 Vict. c. 86, s. 42, rule 5, it is enacted that in all suits for the protection of property, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

(*p*) *Neale* v. *Cripps*, 4 Kay & J. 472.
(*q*) *Norway* v. *Rowe*, cited 1 Myl. & Cr. 522.
(*r*) *Powys* v. *Blagrave*, 4 De Gex. Mac. & G. 448.
(*s*) *Coffin* v. *Coffin*, Jac. 70.
(*t*) *Marshall* v. *Watson*, 25 Beav. 504.
(*u*) *Hartz* v. *Schrader*, 8 Ves. 317.
(*x*) *Brydges* v. *Kilburne*, cited *Jackson* v *Cator*, 5 Ves. 688. *Harrow School* v *Alderton*, ante, p. 215. *Rex* v. *Butterton* 6 T. R. 555. *E. I. Co.* v. *Vincent*, 2 Atk 82. *Parrott* v. *Palmer*, 3 Myl. & K. 640
(*y*) *Harcourt* v. *White*, 28 Beav. 311 30 Law J., Ch. 681.

CHAPTER VI.

OF TRESPASS UPON REAL PROPERTY—TITLE TO LANDS AND TENEMENTS.

SECTION I.—*Of trespasses upon lands and tenements.*—What constitutes a trespass—Abuse of a license or authority rendering parties trespassers ab initio—Trespasses by cattle and domestic animals—Trespasses from want of fences and from defective fences—Who is bound to fence and repair fences—Destruction of crops by rabbits and pigeons—Damage done by trespassing dogs—Trespasses where the surface and subsoil constitute separate freeholds—Forcible entry and detainer—Trespasses upon the soil of highways—Continuing trespasses.

SECTION II.—*Of the title to land fences and boundary-walls.*—Trial of title in an action of trespass—Title to realty from twenty years' possession—Limitation of actions for the recovery of realty—Accrual of the right on dispossession, or discontinuance of possession—What is a dispossession or discontinuance of possession, causing the time of limitation to begin to run—Occupation of poor relations and servants—The possession of the servant the possession of the master—Accrual of the right on death, alienation, forfeiture—Conversion of tenancy-at-will into an indefeasible estate—Possession by cestui que trust—Title of bonâ-fide purchasers of trust estates—Acquisition of title by parties who gained possession as tenants from year to year—Continued wrongful receipt of rent—Possession of coparceners, joint-tenants, tenants-in-common, relations, &c.—Acknowledgments of title—Disabilities—Preservation of title by re-entry and resumption of possession—Rights of mortgagees, lay rectors, &c.—Title to the sea-shore, the soil of fresh-water lakes, highways, private ways, &c., and adjoining waste land—Title to the soil of towing-paths and artificial river-banks and canal-banks—Right of property in trees and bushes, boundary-walls and fences, hedges and ditches—Title to pews.

SECTION III.—*Of actions for trespasses upon realty.*—Damage by rioters—Parties to be made plaintiffs and defendants in actions of trespass—Pleadings—Liberum tenementum—Leave and license—Pleas of justification—Defences and evidence—Assessment of damages—Surrounding circumstances of aggravation—Apportionment of damages as between tenant and reversioner—Damages recoverable from one of several co-trespassers—Tenants holding over—Prevention of trespasses by injunction.

SECTION I.

OF TRESPASSES UPON LANDS AND TENEMENTS.

What constitutes a trespass.—Every entry upon land in the occupation or possession of another constitutes a trespass, in respect of which an

action for damages is maintainable, unless the act can be justified in the exercise of some legal or personal authority or incorporeal right (ante, ch. 3). If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done (ante, pp. 6–9). If the entry is made after notice or warning not to trespass, or is a wilful and impertinent intrusion upon a man's domestic privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable (*z*); but if there has been no insulting or wilful and persevering trespass, and no actual damage done, and no question of title is involved, the damages recoverable may be merely nominal, and the trespass may be excused altogether, if it can be shown that it was committed in self-defence, in order to escape from some pressing danger or apprehended peril (*a*), or in defence of the possession of a man's goods and chattels, or cattle, sheep, or domestic animals; for "if I drive my beasts along the highway, and you have open uninclosed land adjoining the highway, and my beasts enter your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have any action against me, because the chasing them was lawful" (*b*). So, if my goods have been taken by you, and placed on your land, I may justify my entry on your land for the purpose of re-taking them (*c*).

Abuse of a license or authority rendering a party a trespasser ab initio.—When a person has a special privilege or authority to enter upon lands to make a seizure of goods, and he exceeds his authority, by breaking open the outer doors of a dwelling-house (*d*), he becomes a trespasser *ab initio*. All his subsequent acts are trespasses, and he is in the same position as if he was a perfect stranger, acting without any colour of excuse or justification (*e*). The same result follows whenever a party has a lawful authority to enter lands for any purpose whatever, and he exceeds his authority by doing on the land what he had no right to do; or by staying longer than he had a right to stay (*f*).

Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass. Every injury to the possession of the occupier is, in principle, an injury to the property; and, therefore, if a man is

(*z*) *Merest* v. *Harvey*, 5 Taunt. 443.
(*a*) 37 Hen. 6, 37, pl. 26.
(*b*) Catesby, arg. 6 Ed. 4, 7, pl. 18. *Goodwin* v. *Cheveley*, 4 H. & N. 631.
(*c*) 2 Roll. Abr. 565, pl. 9.
(*d*) Post, ch. 11, s. 1.
(*e*) *Attack* v. *Bramwell*, 32 Law J., Q. B. 146.
(*f*) Com. Dig. TRESPASS (C), 2. *Six Carpenters'* case, 8. Co. 146a. *Reed* v. *Harrison*, 2 W. Bl. 1218. *Aitkenhead* v. *Blades*, 5 Taunt. 197; post, ch. 14, s. 2.

unlawfully turned out of his dwelling-house, that amounts, in point of law, to an injury to the dwelling-house (*g*).

Where an action was brought for trespassing on a close and treading down the grass, and the defendant pleaded that he had land lying next the said close, and upon it a hedge of thorns, and he cut the thorns, and they, *ipsô invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, and the plaintiff demurred, it was adjudged for the plaintiff: for though a man doth a lawful thing, yet if any damage do hereby befall another, he shall answer for it, if he could have avoided it (*h*).

If one man throws stones, rubbish, or materials of any kind, on the land of another, or allows his cattle, poultry, or domestic animals, to go upon another man's land, this is a trespass for which he is responsible in damages, unless he can show that his neighbour was bound by contract or prescription to fence for his benefit (*i*). To pour water out of a pail into another man's yard, or to fix a spout so as to discharge water upon another's land, or to suffer filth to ooze through a boundary-wall and to run over another's close or yard without his leave or permission, is a trespass, unless a right of way over the adjoining close, or a right to discharge water upon it, or a right for the passage of waste-water and refuse through it, has been gained (*k*).

Trespasses by cattle and domestic animals.— If a man's cattle, sheep, or poultry, or any animals in which the law gives him a valuable property, trespass upon another's close, the owner of the animals is, as we have seen (ante, p. 102), responsible for the trespass, unless he can show that his neighbour was bound to fence, and had failed so to do (*l*). And it matters not whether the animals be at the time in his own immediate care or charge, or under the care of his servants, or in the custody of a stranger. In this last case, the stranger may be sued as well as the owner for the trespass (*m*). But if my servant, without my knowledge, takes my beasts and puts them in another's land, my servant is the trespasser, and not I; for, by his wilful dealing with the beasts without any authority from me, he gains a special property in them for the time, and for this purpose they become his beasts (*n*). But if a wife so deals with her husband's cattle, the husband himself is the trespasser, for his wife can gain no special property in them as against the husband (*o*).

Trespasses from want of fences and from defective fences.— Where the

(*g*) *Meriton* v. *Coombes*, 9 C. B. 972; 19 Law J., C. P. 336.

(*h*) Mich. 6, E. 4, p. 7, pl. 18.

(*i*) Williams, J., *Cox* v. *Burbidge*, 13 C. B., N. S. 438; Holt, C. J., *Mason* v. *Keeling*, 1 Ld. Raym. 608; 12 Mod. 336. *Dawtry* v. *Huggins*, Clayton, 32. Vin. Abr. TRESPASS (B).

(*k*) *Reynolds* v. *Clarke*, 2 Ld. Raym. 1399.

(*l*) *Sagrill* v. *Milward*, 21 Hen. 6, p. 33, pl. 20.

(*m*) 2 Roll. Abr. 546, pl. 20. *Dawtry* v. *Huggins*, Clayt. 32, pl. 56.

(*n*) 2 Roll. Abr. TRESPASS, 553, pl. 25.

(*o*) Ib. 553, pl. 2.

plaintiff himself has contributed to the injury of which he complains, he has no ground, as we have seen, for seeking compensation in damages (ante, p. 16). If, therefore, a man is bound by contract or prescription (ante, p. 102), to repair a fence between my land and his, and he neglects to repair, and by reason thereof my beasts get into his land, this is a good justification to an action of trespass brought by him (*p*). In such a case, it is lawful for me to go into my neighbour's land after my beasts, and chase them back into my own land; and I may plead this as a justification for the trespass, because it was rendered necessary by the default of my neighbour (*q*).

Who is bound to fence and repair fences.—Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbour (*r*), unless one proprietor has acquired a right or title, by grant or prescription, to have the boundary-fence between his close and that of the adjoining proprietor maintained and repaired at the expense of such adjoining proprietor (ante, p. 102). "Every man must use his own land so as thereby not to hurt another; and as, of common right, one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. If, therefore, a vendor sells a piece of pasture lying open to another piece of pasture of which he is possessed, the vendee is bound to keep his cattle from running into the vendor's piece" (*s*). If a landowner, who has land abutting upon a highway, neglects to fence the land from the highway, so that cattle stray from the highroad and injure his crops, he cannot immediately distrain the beasts' damage feasant, or treat the owner of the beasts as a trespasser, but must either drive them out himself, or allow a reasonable time to the drovers in charge of them to get them out of the land (*t*). But if the beasts are not lawfully using the highway, if they have strayed away from the owner or his servants, and are trespassing upon the public thoroughfare, and pass from thence on to the adjoining uninclosed land, this is a trespass for which the owner of the beasts is responsible (*u*). And whenever one landowner is bound to maintain and repair a fence for the benefit of the adjoining landowner, and cattle escape out of the land of the latter, and trespass upon the land of the party who ought to have kept up the fence, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put

(*p*) 2 Roll. Abr. TRESPASS, 565, pl. 3, citing 19 Hen. 6, 34; 39 E. 3, 3b.

(*q*) Ib. pl. 4.

(*r*) Bayley, J., *Boyle* v. *Tamlin*, 6 B. & C. 337; Dyer, 372b.

(*s*) *Tenant* v. *Goldwin*, 6 Mod. 314.

(*t*) *Goodwin* v. *Cheveley*, 4 H. & N. 631; 28 Law J., Exch. 298; 7 W. R. 630.

(*u*) 2 Roll. Abr. 565, pl. 7. *Dovaston* v. *Payne*, 2 H. Bl. 528.

them there. If it be a way, he must show that he was lawfully using the way (*x*).

Destruction of crops by rabbits and pigeons.—If a man encourages the growth of wild rabbits upon his land, and forms "coney burrows" there, and the rabbits stray from his land to the land of his neighbour, this is no trespass for which the breeder of the rabbits is responsible, for when they have left his land they are not then *his* rabbits doing damage. Being animals *feræ naturæ*, he has no more property in them after they have left his soil than in the birds of the air, which may breed in one man's land and devour the crops of another (*y*). The only remedy, therefore, for a person whose crops are eaten by wild rabbits is the capture and destruction of the rabbits. Commoners may destroy rabbits which come upon the common from the adjoining land, not being the lord's land (*z*); but they have no remedy against those who breed them (*a*). The same law prevails with regard to pigeons; "if they come upon my land I may kill them," but I have no remedy against any one for breeding them (*b*).

Damage done by intruding dogs.—A man is not, by the common law, considered to have the same valuable property in a dog as in cattle and sheep; and it has been held that if a man's dog goes into his neighbour's garden, and spoils and injures his crops, no action will lie (*c*), unless the master accompanies the dog, and is himself a trespasser; in which case the damage done by the dog is consequential upon the trespass by the master (*d*). But owners of dogs in Scotland and Ireland have recently been made liable for injuries to sheep and cattle by their dogs. And all persons who harbour dogs on their premises are, in Scotland, deemed to be the owners of the dogs, unless they can prove the contrary, and show that the dog remained on their premises without their knowledge (*e*).

Trespasses where the surface and subsoil of land constitute separate freeholds.—If it appears that the plaintiff has parted with the vesture and herbage, and right to the surface of the land, and retains only an interest in the subsoil, he cannot maintain an action for trespasses upon the surface (*f*); but if any person digs holes through the surface, and trespasses upon the subsoil, he is then entitled to an action for damages (*g*). If land is demised generally to a lessee, who enters under the lease, he is in possession of both the surface and the minerals; but he has no right to work

(*x*) *Dovaston* v. *Payne*, ut sup.; Anon. 3 Wils. 126.

(*y*) *Boulton's* case, 5 Co. 104a; Cro. Eliz. 547.

(*z*) *Cooper* v. *Marshall*, post, ch. 3, s. 1.

(*a*) *Hinsley* v. *Wilkinson*, Cro. Car. 387.

(*b*) *Dewell* v. *Sanders*, Cro. Jac. 490. Bayley, J., *Hannam* v. *Mockett*, 2 B. & C. 930.

(*c*) Holt, C. J., *Mason* v. *Keeling*, 12 Mod. 330.

(*d*) *Beckwith* v. *Shordike*, 4 Burr. 2093. As to damage done by ferocious dogs, see ante, pp. 177, 178.

(*e*) 25 & 26 Vict. c. 59; 26 & 27 Vict. c. 103.

(*f*) *Cox* v. *Mousley*, 5 C. B. 549.

(*g*) *Cox* v. *Glue*, ib. 549, 553; 17 Law J., C. P. 162.

the minerals without the license of the lessor, neither can the lessor work them without the permission of the lessee. If the adjoining occupier sinks a mine in his own land, and makes lateral excavations, trespassing upon the minerals of the lessee without disturbing the surface of the land in his occupation, the lessee may, nevertheless, maintain an action for the trespass and injury to his possessory interest, and the lessor may maintain an action for the injury to his reversionary estate. If the surface and minerals have been dissevered in title, and have become separate tenements, then the grantee or owner of the minerals is the only person entitled to sue in respect of trespasses upon them (*h*).

Forcible entry and detainer.—At common law, if a man had a right to the possession of land, and a right to enter thereon, he might enter and obtain possession with force and arms, and retain possession by force, which gave an opportunity, we are told, to powerful men to enter upon land under pretence of feigned titles, and forcibly eject their weaker brethren (*i*), and therefore it was enacted (5 R. 2, c. 7), "that none thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner" (*k*). A mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the landowner, become possessed of the land upon which he has trespassed, and which he tortiously holds, and he may consequently be expelled by main force (*l*); but if he is allowed to continue on the land, and the landowner sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful, though it be, and cannot be forcibly ejected. A mere intruder upon land, who has been allowed to run up a hut and occupy it, has no right to the hut or to the possession thereof, and the landlord may enter and pull down the hut about the ears of the occupants and remove the materials (*m*). But the dwelling-houses of strangers cannot be pulled down whilst people are living in them, for the mere purpose of abating a nuisance or preventing the enjoyment of some incorporeal right, such as a right of common (*n*). The rightful owner cannot, in any case, when he has a right of entry, be made responsible in damages for a trespass upon his own land, for he is no trespasser if he has a right to go upon it (*o*); but if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully, after their title to occupy

(*h*) *Keyse* v. *Powell*, 2 Ell. & Bl. 144; 22 Law J., Q. B. 305. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437.

(*i*) Bac. Abr. FORCIBLE ENTRY.

(*k*) As to recovery of possession by persons forcibly expelled, see 8 H. 6, c. 9; 31 Eliz. c. 11; 21 Jac. I, c. 15.

(*l*) *Browne* v. *Dawson*, 12 Ad. & E. 629.

(*m*) *Davison* v. *Wilson*, 11 Q. B. 890; 17 Law J., Q. B. 196.

(*n*) *Jones* v. *Jones*, 31 Law J., Exch. 506.

(*o*) *Davison* v. *Wilson*, 11 Q. B. 890; 17 Law J., Q. B. 196.

has been determined, he may be made responsible for the assault, and be indicted for a forcible entry (*p*), but he cannot be made responsible in damages for the expulsion (*q*). Having a right to enter upon his own land, he may do so peaceably; and if his entry is resisted by force, he may, it seems, repel force by force (*r*).

"Where a breach of the peace," observes Parke, B., "is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public, in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that the defendant entered upon it accordingly" (*s*).

Of trespasses upon the soil of highways set out and dedicated to the public by private proprietors.—By setting out a highway, and dedicating it to the use of the public, the owner of the land over which the right of way is granted does not thereby part with the property in the soil. The landlord, in such a case, has full dominion and control over the land subject to the easement, and may recover it in ejectment (*t*), or bring an action for a trespass against any person who deposits stones or rubbish upon the soil, or constructs a bridge over or upon any part of the highway, or infringes in anywise upon the ordinary proprietary rights of the owner of the soil (*u*). And the same rule prevails with regard to land over which any other privilege or easement has been granted to particular individuals, or to the public at large, such as a stall in a market (*v*).

Of continuing trespasses.—If a man throws a heap of stones, or builds a wall, or plants posts or rails on his neighbour's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day, till the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance on the land, and another action for continuing the thing so erected for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of the right to continue the injury (*x*).

(*p*) *Newton* v. *Harland*, 1 Sc. N. R. 492.
(*q*) *Pollen* v. *Brewer*, 7 C. B., N. S. 373; 6 Jur. N. S. 509.
(*r*) *Newton* v. *Harland*, 1 Sc. N. R. 492.
(*s*) *Harvey* v. *Bridges*, 14 M. & W. 442; 1 Exch. 261. *Davison* v. *Wilson*, 11 Q. B. 890. *Meriton* v. *Coombes*, 9 C. B. 787; 19 Law J., C. P. 336.
(*t*) *Goodtitle* v. *Alker*, 1 Burr. 133.
(*u*) 3 Com. Dig. CHIMIN. (A. 2) 27. *Lade* v. *Shepherd*, 2 Str. 1004. *Every* v. *Smith*, 26 Law J., Exch. 345.
(*v*) *Mayor of Northampton* v. *Ward*, 1 Wils. 114.
(*x*) *Holmes* v. *Wilson*, 10 Ad. & E. 503. *Bowyer* v. *Cook*, 4 C. B. 236.

SECTION II.

OF THE TITLE TO LAND, FENCES, AND BOUNDARY-WALLS.

Trial of title in an action of trespass.—If the defendant, in an action for a trespass committed by him upon the land or messuage of the plaintiff, pleads that the close or land in which the trespass was committed was the soil and freehold of the defendant, the plaintiff's title to the property is in issue, and also his right of possession (post, s. 3), and the defendant may, under this plea, bring forward evidence to show that he had a right to enter upon the close because it is his freehold, or because it has been demised to him, or because he had obtained an indefeasible title under the statute for the limitation of actions and suits relating to real property (*y*).

Title to realty from twenty years' possession—Limitation of actions for the recovery of realty.—By 3 & 4 Wm. 4, c. 27, s. 2, entitled "An Act for the Limitation of Actions and Suits relating to Real Property," it is enacted, that no person shall make an entry or distress, or bring an action to recover any land or rent, but within TWENTY YEARS next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to some person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*z*).

Accrual of the right on dispossession or discontinuance of possession.—When the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then the right is to be deemed (s. 3) to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any profit or rent was so received.

What is a dispossession or discontinuance of possession causing the time of limitation to begin to run.—The word discontinuance of possession means an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour, or for whose protection, the act would operate. To constitute discontinuance, there must be both dereliction by the person who has the right and actual pos-

(*y*) As to registration of title to real estates, see 25 & 26 Vict. c. 53.

(*z*) *Brassington* v. *Llewellyn*, 27 Law J., Exch. 297.

session, whether adverse or not, to be protected (*a*). Therefore, where the owner of the fee simple of a close, with a stratum of coal and other minerals under it, has conveyed the surface to one under whom the plaintiff claims, reserving the minerals, and a right of entry to get them, to another under whom the defendant claims, the title and right of entry of the grantees of the mines is not barred by simple non-user for more than forty years, no other person having worked or been in possession of the mines (*b*).

Occupation by poor relations and servants — The possession of the servant the possession of the master.— A landowner who accommodates a poor relation with a cottage and garden, does not necessarily part with the possession of the property occupied by such poor relation. The latter may have the mere custody of the property ; his possession, such as it is, may be the possession of the landowner ; and the latter may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property, and prevent the operation of the Statute of Limitations (*c*). If a landowner allows his gardener, or servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman who occupies part of his master's coach-house, or sleeps over his master's stables ; and no title can be gained by such an occupation and enjoyment of the master's property, however long it may be continued. And if a landowner, from motives of kindness or charity, allows a dependent, relative, or friend to occupy a cottage and land upon his estate, and the landowner, during such occupation, continues to exercise acts of ownership over the land so occupied ; if he repairs the buildings, cuts down or plants trees, or causes drains to be made through the land, or quarries and carries away stone, all these acts of dominion exercised by him over his own property show that he has never parted with the possession of it, although he has allowed another person to occupy it, and share with him in the use and enjoyment thereof (*d*). A society, also, which allows its agent to live on its premises rent-free does not confer any estate or interest in the land upon the latter, but the occupation is merely the occupation of a servant (*e*).

Accrual of the right on death, alienation, forfeiture, &c.—Provision is also made (s. 3) for the accrual of the right, and the commencement of the period of limitation when the person claiming the land or rent

(*a*) Blackburne, C. J., *M'Donnell*, v. *M'Kinty*, 10 Irish Law Rep. 516.

(*b*) *Smith* v. *Lloyd*, 23 Law J., Exch. 194; 9 Exch. 571.

(*c*) *Bertie* v. *Beaumont*, 16 East, 33. *Hunt* v. *Colson*, 3 M. & Sc. 791. *Doe* v. *Stanton*, 2 B. & Ald. 371. *Mayhew* v. *Suttle*, 4 El. & Bl. 353.

(*d*) *Turner* v. *Doe*, 9 M. & W. 645.

(*e*) *White* v. *Bailey*, 10 C. B., N. S. 227 ; 30 Law J., C. P. 253.

claims the estate or interest of some deceased person, who continued in possession or receipt of the profits of the land or rent in respect of the same estate or interest, until the time of his death, and was the last person entitled to the estate or interest in such possession or receipt; also when such person claims in respect of an estate or interest in possession granted, or assured, by any instrument other than a will to him, or some other person through whom he claims, by a person, being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument has been in possession or receipt; also when the estate or interest claimed has been an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained possession or receipt of the profits of the land, or the receipt of rent in respect of such estate or interest; also when the claimant, or the person through whom he claims, has become entitled by reason of any forfeiture, or breach of condition.

Provision is made (ss. 4, 5) for giving new rights of entry, &c. to remaindermen and reversioners in certain contingencies.

Conversion of defeasible tenancies-at-will into an indefeasible title — Possession of land by a cestui que trust.—When any person is in possession or receipt of the profits of land or rent, as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims to make entry or distress, or bring action to recover such land or rent, is to be deemed (s. 7) to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement thereof, at which time such tenancy shall be deemed to have determined (*f*). But it is provided that no mortgagor or cestui que trust shall be deemed to be a tenant-at-will to his mortgagee or trustee within the meaning of that clause. This proviso is applicable only to cases of express and declared trusts; so that a person let into possession of and holding lands under an agreement to purchase, is not a cestui que trust within this proviso (*g*). A cestui que trust may, in a certain sense, be tenant-at-will to his trustee, if he has been let into possession of the trust estate by the latter, although he is not a tenant-at-will capable of acquiring a title by reason of his possession, within the third section of the statute. The possession of the cestui que trust is, in fact, the possession of the trustee, and the time of limitation will not run against the latter, so long as the relationship of trustee and cestui que trust subsists (*h*). But this applies only to the case where the cestui que trust is the actual occupant. If he is merely allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the

(*f*) *Doe* v. *Moore*, 9 Q. B. 561.
(*g*) *Doe* v. *Rock*, 4 M. & Gr. 31.
(*h*) *Garrard* dem. *Tuck*, 8 C. B. 252; 18 Law J., C. P. 338.

relation only of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate; and if the actual occupier is, under such circumstances, permitted to occupy for more than the twenty years prescribed by the statute, without paying rent, the trustees lose their title, and the actual occupier gains the title exactly as in an ordinary case of landlord and tenant (*i*). But if the cestui que trust has been let into possession by the trustees, the tenancy between him and his trustees will not be determined by his underletting the premises, unless the trustees have notice of such underletting; for though the general rule is that a tenancy-at-will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification, that a tenant-at-will cannot at common law determine his tenancy by transferring his interest to a third party, without notice to his landlord (*k*).

Title of bonâ-fide purchasers of trust estates.—When any land is vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land, is (s. 25) to be deemed to have first accrued at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

Acquisition of title by parties who obtained possession originally as tenants from year to year.—When any person is in possession or receipt of the profits of any land or rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, is to be deemed (s. 8) to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, shall have been received (which shall last happen). A tenant holding a house of parish-officers upon the condition of sweeping the church, or ringing the church-bell, is a tenant from year to year within this section of the statute (*l*). The words "lease in writing" are construed to mean not merely a demise in writing, but such an instrument as passes an interest (*m*). Verbal declarations and admissions made by a tenant in possession of his having paid rent, and of the party to whom it was paid, are admissible in evidence to establish the fact of the receipt of rent within this section (*n*).

(*i*) *Melling* v. *Leak*, 16 C. B. 669; 24 Law J., C. P. 187. *Doe* v. *Phillips*, 10 Q. B. 134.

(*k*) *Carpenter* v. *Collins*, Yelv. 73. *Pinhorn* v. *Souster*, 8 Exch. 763. *Melling* v. *Leak*, 16 C. B. 669.

(*l*) *Doe* v. *Benham*, 7 Q. B. 982. *Doe* v. *Billett*, ib. 983. *Doe* v. *Hinde*, 2 M. & Rob. 441.

(*m*) *Doe* v. *Gower*, 17 Q. B. 589; 21 Law J., Q. B. 57.

(*n*) *Doe* v. *Beckett*, 4 Q. B. 605; 12 Law J., Q. B. 236.

Effect of continued wrongful receipt of rent.—It is also enacted (s. 9), that when any person shall be in possession or receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent of 20*s.* or upwards shall be reserved, and the rent shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or bring an action, after the determination of such lease, shall be deemed to have first accrued at the time at which the rent was first so received by the person wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Entry upon land, and continued claim.—It is further enacted (s. 10), that no person shall be deemed to have been in possession of any land within the meaning of the act, merely by reason of his having made an entry thereon; and (s. 11) that no continual or other claim upon or near any land shall preserve any right of making an entry, or distress, or of bringing an action.

Possession of coparceners, joint-tenants, and tenants-in-common.—When any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their undivided share, for his or their own benefit, or for the benefit of any person other than the persons entitled to the other shares of the land or rent, such possession or receipt is not to be deemed to have been the possession or receipt of, or by such last-mentioned persons, or any of them.

Possession of younger brothers or relations.—When a younger brother, or other relation of a person entitled as heir to the possession or receipt of the profits of land, or to the receipt of rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of the heir.

Acknowledgments of title.—By s. 14 it is further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt by the person by whom such acknowledgment shall have been given shall be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, shall

be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*o*).

Ecclesiastical and eleemosynary corporations are allowed (s. 29) two incumbencies, and sixty years for the recovery of land.

Disabilities.—Ten years are allowed (s. 16) in all cases for persons under disability from the time the disability ceases, but no action is to be brought (s. 17) after forty years. The disabilities enumerated as having the effect of extending the period of limitation, are infancy, coverture, idiotcy, lunacy, unsoundness of mind, and absence beyond seas, at the time the right to make an entry or distress, or bring action to recover any land or rent, shall have first accrued. The extension of the period of limitation is granted also from the death of the person under disability.

Preservation of the rights of the landowner by re-entry and resumption of possession of lands before the expiration of the period of limitation.—We have seen, by s. 7 of the statute 3 & 4 Wm. 4, c. 27, that when any person is in possession of land as tenant-at-will, the right of the landowner to enter upon the land, or recover it by action, accrues either at the determination of such tenancy, or at the expiration of one year after the commencement thereof, at which time the tenancy, if not previously determined by the act of the landowner, shall be deemed to have determined (ante, p. 229). We have seen, also, that no person is to be deemed to have been in possession of land within the meaning of the act, merely by reason of his having made an entry thereon, and that no continual claim upon, or near to land, shall preserve any right of making an entry or bringing an action (ante, p. 231). "The making an entry," observes Creswell, J., "amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord." Where, therefore, the defendant had inclosed a piece of land from the waste and built a hut thereon, and the lord of the manor entered upon the premises, and said he took possession in his own right, and ordered a stone to be removed from the hut, and a portion of the fence to be thrown down, but did not turn the defendant and his family out of the cottage, it was held that this was no interruption of the possession of the defendant, and no vesting of the possession in himself, and that the lord had not done enough for the assertion of his rights, and for preventing the defendant from gaining a title under the statute (*p*).

Where, on the other hand, the overseers of a parish put the plaintiff into possession of a parish cottage as a parish pauper, and he having con-

(*o*) *Ley* v. *Peter*, 3 H. & N. 101; 27 Law J., Exch. 239. *Goode* v. *Job*, 28 ib. Q. B. 1. *Fursdon* v. *Clogg*, 10 M. & W. 576.

(*p*) *Doe* v. *Coombes*, 9 C. B. 718; 19 Law J., C. P. 906. *Brassington* v. *Llewellyn*, 27 Law J., Exch. 297.

tinued in possession for a long time without paying any rent, the overseers in 1839 entered upon the cottage, to prevent him from gaining a title under the statute, and turned out both him and his family and removed his furniture; but, on the same day, the plaintiff resumed possession of the cottage, and continued in possession till July 1852, when the overseers again entered, and he refusing to deliver up the cottage, they destroyed it, and the plaintiff then brought an action of trespass, and the defendants pleaded that the cottage was not the property of the plaintiff; it was held that the right of the defendants was not barred, as they had in 1839 actually dispossessed the plaintiff, and resumed possession of the cottage, and clothed themselves with their original rights.

"Whether the plaintiff," observes Lord Campbell, "during the interval between 1839 and 1852 was tenant-at-will or tenant-at-sufferance, or a mere trespasser, seems to be wholly immaterial, so that the overseers had not in the interval done anything to prejudice the right of entry which vested in them in 1839. It is admitted that the plaintiff would have had no title had the jury found that his subsequent occupation was under a new tenancy-at-will; but how would this at all have affected the new right of entry which had accrued in April 1839? An attempt was made to do away with the effect of what then happened, by resorting to section 10 of the statute, which enacts, 'that no person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon.' But this evidently applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stopping on any corner of the land in the night-time and pronouncing a few words, without any attempt, or intention, or wish to take possession. In the present case possession was actually taken by the overseers *animo possidendi*; and whether possession was retained by them an hour or a week must, for this purpose, be immaterial (*q*). So, where a tenant-at-will refused to go out, and was served with a writ of ejectment, and an arrangement was then come to by which he gave up part of the land, and was allowed to remain in a cottage during his life, it was held that a new tenancy-at-will commenced on the making of this arrangement, and that the time of limitation began to run one year after the making thereof (*r*).

Rights of mortgagees.—The statute 7 Wm. 4, & 1 Vict. c. 28, provides that it shall be lawful for any person claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the

(*q*) *Randall* v. *Stevens*, 2 Ell. & Bl. 650; 23 Law J., Q. B. 71.

(*r*) *Locke* v. *Matthews*, 13 C. B., N. S. 753; 32 Law J., C. P. 98.

right to make such entry, or bring such action or suit, shall have first accrued (*s*).

Rights of lay rectors.—A lay rector has no right as against the vicar to the possession of the church or chancel (*t*).

Title to the sea-shore.—The sea-shore between high-water and low-water mark is *primâ facie* the property of the Crown (*u*), and is extra-parochial, unless it be shown by common reputation or otherwise to form part of an adjoining parish (*x*). The soil may, however, be vested in a private individual, or in the lord of the manor, by ancient grant from the Crown, and may form part of the adjoining manor (*y*); but proof that it does so ought to be strictly and rigidly required from all lords of manors who set up exclusive rights in the soil, in derogation of the free use and enjoyment of the sea-shore by the public. Where proof was given by the lord of the manor or territory of Gower of an ancient grant of the terra de Gower in the time of King John, and the limits of the manor both on the land and the sea-side were uncertain, common reputation, modern usage, and the exercise by the lord of acts of dominion over the sea-shore, were admitted in evidence to show the boundary of the manor on the sea-side (*z*).

And where a manor was held under an ancient grant from the Crown, which professed to grant the manor with wreck of the sea, several fishery and other rights of an extensive description, but did not expressly purport to convey "littus maris," it was held that acts of dominion and ownership exclusively exercised by the lord upon the adjoining sea-shore, between high and low-water mark, and which acts would have been unlawful without a license or grant from the Crown, such as the constant and exclusive digging and taking away of sand, stones, gravel, and sea-weed, might be called in aid of the grant to show that the sea-shore was parcel of the manor (*a*). But mere occasional acts of taking sand or gravel, shells or sea-weed, from the sea-shore, ought not of themselves, without proof of adverse and exclusive enjoyment on the part of the lord, to raise any presumption of a grant of the soil from the Crown; nor would a jury from such evidence find a grant (*b*). By a grant of the sea-shore, the Crown conveys not that which at the time of the grant is between high and low-water marks, but that which from time to time shall be between these two termini, so that the freehold shifts as the sea recedes or en-

(*s*) *Doe* v. *Massey*, 17 Q. B. 381; 20 Law J., Q. B. 434.

(*t*) *Griffin* v. *Dighton*, 2 N. R., Q. B. 270.

(*u*) Hale *de Jure Maris*, Hargrave's Law Tracts, pp. 25–37.

(*x*) *Reg.* v. *Musson*, 6 W. R. Q. B. 246.

(*y*) *Whitstable (free fishers of)* v. *Gann*, 11 C. B., N. S. 387; 31 Law J., C. P. 372.

(*z*) *Duke of Beaufort* v. *Mayor, &c. of Swansea*, 3 Exch. 413.

(*a*) *Calmady* v. *Rowe*, 6 C. B. 861. *Att.-Gen.* v. *Jones*, 6 Law T. R., N. S. 655.

(*b*) *Livett* v. *Wilson*, 3 Bing. 115.

croaches. The ordinary limit of the sea-shore is the line of the medium high tide between the springs and the neaps (*c*).

Different rights in the sea-shore may be vested in a subject, according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot (*d*). But the grantee of the Crown must take subject to such prescriptive rights as may have been acquired by subjects by immemorial usage and enjoyment (*e*).

Title to the soil of fresh-water lakes.—It does not appear to be clearly established whether the soil of lakes, like that of fresh-water rivers, belongs *primâ facie* to the owners of the land, or of the manors on either side, *ad medium filum aquæ;* or whether it belongs *primâ facie* to the king in right of his prerogative (*f*).

Of the title to waste uninclosed land adjoining the sea-shore.—All uninclosed waste land abutting on the sea-shore, and situate above the high-water mark of ordinary spring-tides, belongs *primâ facie* to the owner of the adjoining property, although it is covered with beach and sea-weed, and overwhelmed with the waves at extraordinary spring-tides (*g*).

Of the right to the soil of turnpike-roads and highways.—The soil of a turnpike-road is not vested in the trustees of the road. The trustees have only the control of the highways, the ordinary rule being that the landowners on either side of the road are entitled to the soil of the road, *usque ad medium filum viæ;* and if a landowner owns the soil on both sides of the road, he is entitled to the soil of the whole road (*h*). This is a presumption of law founded on the assumption that in making a road for public convenience, the owners of the land on each side of the road have contributed a portion of their land towards the formation of the road. Where the owner of two parcels of land on either side of a highway conveys them to a purchaser, the soil of the road passes by presumption of law, although the conveyance is silent as to the existence of the road, and although the particular measurement of each parcel of land is given, which would exclude the road; but this presumption may be rebutted by circumstances showing that the grantor did not intend to transfer to the grantee his right of ownership in the soil of the highway. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the subject-

(*c*) *Att.-Gen.* v. *Chambers*, 4 De G. M. & G. 213.

(*d*) *Scratton* v. *Brown*, 4 B. & C. 497.

(*e*) Ld. Denman, C. J., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 374; ante, ch. 3.

(*f*) As to grants of a several fishery with livery of seizin, conveying a freehold interest in the soil covered with the water, *Marshall* v. *Ulleswater*, 32 Law J., Q. B. 139.

(*g*) *Lowe* v. *Govett*, 3 B. & Ad. 869. Hale, *de Jure Maris*, c. 4, p. 12. Harg. Law Tracts. As to land gained from the sea, *Att.-Gen.* v. *Rees*, 4 De G. & J. 55.

(*h*) *Davison* v. *Gill*, 1 East, 69. *Marquis of Salisbury* v. *Gt. North. Rail. Co.*, 28 Law J., C. P. 53; 5 C. B., N. S. 208.

matter of the grant. And if lands abutting upon a highway are described in the grant as bounded by the highway, the right to the soil, *ad medium filum viæ*, will be impliedly included in the grant, unless the surrounding circumstances rebut the presumption (*i*). And where the land intended to be conveyed is described by measurement and colour, on a plan annexed to, and forming part of, the conveyance, the soil of the highway, *usque ad medium filum*, passes by the conveyance, unless it is expressly excluded (*k*).

No legal presumption arises as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority, such as a board of commissioners for inclosing lands, acting under the powers of an act of parliament (*l*).

The right to the soil of accommodation-ways and private roads depends upon the history of the premises, and the evidence of acts of ownership over the soil of the road. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, the jury may presume that the soil belongs half to the one and half to the other. But that presumption may be rebutted by evidence showing acts of ownership on the part of one only of such adjoining proprietors (*m*), or by proof of a reservation of the soil of the road by a grantor under whom the landowners on either side of the road claim title (*n*).

Of the title to waste lands adjoining public highways.—Waste land extending along a public highway is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor (*o*); but this presumption prevails only so long as proof to the contrary is wanting (*p*). In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labour and expense were not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence—that although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure

(*i*) *Sidney* (*Lord*) v. *City Com. &c.*, 12 Moore, P. C. C. 498.

(*k*) *Berridge* v. *Ward*, 10 C. B., N. S. 415; 30 Law J., C. P. 218. *Simpson* v. *Dendy*, 8 C. B., N. S. 433. *Dendy* v. *Simpson*, 7 Jur. N. S. 1058.

(*l*) *Rex* v. *Hatfield*, 4 Ad. & E. 156.

(*m*) *Holmes* v. *Bellingham*, 7 C. B., N. S. 329.

(*n*) *Tottenham* v. *Byrne*, 12 Ir. C. L. R. 388.

(*o*) *Doe* v. *Pearsey*, 7 B. & C. 307.

(*p*) *Doe* v. *Hampson*, 4 C. B. 273. *Dendy* v. *Simpson*, 18 C. B. 831. *Dendy* v. *Simpson*, 7 ib. 1058.

on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of waste left at the sides of roads: the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair (*q*).

But the ordinary presumption, that a narrow strip of land lying between the highway and the adjoining close belongs to the owner of the close, is either done away with or considerably narrowed, if the narrow strip is contiguous to, or communicates with, open commons or larger portions of land; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them (*r*).

Of the right to the soil of towing-paths and the banks of rivers and canals.—Navigation companies authorized by statute to set out towing-paths, first giving satisfaction to the owners and proprietors of lands made use of for the purpose, do not, by forming a towing-path and giving satisfaction to the owner of the land over which the path is formed, acquire more than a right of way for towing, in the nature of a servitude or easement. Statutory powers of this sort do not enable them to acquire the soil itself. Landowners, therefore, whose lands abut upon a navigable river or canal, along which a towing-path extends, have a right to form wharfs on the soil of the towing-path, and to cross the towing-path wherever they please, for the purpose of loading and unloading vessels, provided they do not interfere with the right of way along the towing-path (*s*). Acts of ownership on the part of the proprietors of a navigation company, exercised over the banks of a navigable river, afford no evidence of the ownership of the soil of such banks being vested in the proprietors of the navigation company. If the act of parliament under which the company is incorporated gives the company no power to purchase land, that is against their claim to be proprietors of the soil. (*t*).

Of the right of property in trees and bushes.—According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant, although, if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action of waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*u*).

(*q*) *Steel* v. *Prickett*, 2 Stark. 469. *Headlam* v. *Hedley*, Holt, N. P. C. 462. *Doe* v. *Kemp*, 2 Bing. N. C. 102.

(*r*) *Grose* v. *West*, 7 Taunt. 42.

(*s*) *Badger* v. *South York. Rail. Co.*, Ell. & Ell. 347; 28 Law J., Q. B. 120; 7 W. R. 130. *Monm. Canal & Rail. Co.* v. *Hill*, 4 H. & N. 427.

(*t*) *Hollis* v. *Goldfinch*, 1 B. & C. 205.

(*u*) *Berriman* v. *Peacock*, 9 Bing. 384.

Of the ownership of trees standing in boundary-hedges.—In an old case, it is said "that if a tree grows in a hedge which divides the land of A and B, and by the roots takes nourishment in the land of A and also of B, they are tenants-in-common of the tree, and so it was adjudged" (*x*). But this must be understood of fences of which the adjoining owners are also tenants-in-common; for the general rule is, that the ownership of the tree follows the ownership of the hedge, and the tree will be held to belong to the party on whose land the trunk stands, without reference to the direction of the roots. By the French law, "Trees which are found in a common hedge are common like the hedge; each of the two proprietors has the right to require that they should be felled."

"He whose property is overshadowed by the branches of his neighbour's trees may compel the latter to cut off such branches. If it be the roots which encroach on his estate, he has a right to cut them therein himself" (*y*).

Of the right of property in boundary-walls and fences.—Evidence of a common user by two adjoining proprietors of a boundary-wall separating their two estates justifies the presumption, either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense, or that it had been agreed between them that the wall, and the land on which it stood, should be considered the property of both as tenants-in-common, so as to insure to each a continuance of the use of the wall (*z*). "When a wall is common property, it may happen, either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties." But "whenever the land on which a boundary-wall is intended to be built belongs on one side to one party, and on the other to the other party, and they between them agree to build the wall, it would be prudent," observes Bayley, J., "to make this bargain, that so long as there was to be a wall continuing on the property, the land on which it was built, and the wall which stood upon that land, should be taken to be the common property of the two, and that the owners of the estates on each side should be tenants-in-common of the undivided moiety of that land and of the wall, with the power of adopting such remedies for partition as tenants-in-common may adopt; for if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two."

(*x*) Anon. 2 Rolle Rep. 255. *Waterman* v. *Soper*, 1 Ld. Raym. 737. *Holder* v. *Coates*, M. & M. 112.

(*y*) Cod. Civ. art. 672, 673.

(*z*) *Wiltshire* v. *Sidford*, 8 B. & C. 359 n.

If one tenant-in-common of a wall destroys the wall which is the subject of the tenancy-in-common, that is an actual ouster and expulsion of the one by the other, so that the party expelled and injured may maintain an action against the wrong-doer for the recovery of damages; but if the wall is pulled down for the mere purpose of rebuilding it, and providing a better and stronger wall, no action is, it seems, maintainable. If an improper addition is made to the height of the wall by one tenant-in-common to the injury of the other, the latter may remove the heightened portion of the wall (*a*). Where a building is placed against the wall by one of two tenants-in-common of the wall, and the wall is heightened and carried up into a chimney, this is evidence of an ouster of the other tenant-in-common, as the altered wall and the old wall are not identical things, and the nature of the property is substantially changed (*b*).

In general, where a boundary-wall is built at the joint expense of adjoining proprietors under the provisions of a building act, so that half the thickness of the wall stands on the ground of each proprietor, the two proprietors are not tenants-in-common of the wall, but each is entitled to the ordinary remedy for any injury done to the part of the wall which stands on his own land (*c*). In the metropolis, party walls are regulated by the Building Act, 18 & 19 Vict. c. 122.

Of the ownership of ditches and hedges.—"The rule," observes Lawrence, J., "about ditching is this. No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge on the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet and eight feet has anything to do with it" (*d*). A boundary-hedge, separating one estate from another, belongs in general to the occupier who has been in the habit of cutting and repairing the hedge. Proof of the exercise of acts of ownership over the hedge is *primâ* evidence of the property in the hedge being in the party who has exercised such acts. In some instances, the adjoining owners are tenants-in-common of the hedge separating their respective properties, so that each has a right to clip the hedge, but not to grub it up (*e*).

By the French law, all ditches between two estates are presumed common, if there be no title or proof to the contrary. But it is proof that a ditch is not common when the bank or earth thrown up is found only on one side of the ditch. The ditch, in such a case, is deemed to belong

(*a*) *Cubitt* v. *Porter*, 8 B. & C. 257. *Murray* v. *Hall*, 7 C. B. 441. *Murly* v. *M'Dermott*, 8 Ad. & E. 138.

(*b*) *Stedman* v. *Smith*, 8 Ell. & Bl. 1; 26 Law J., Q. B. 315.

(*c*) *Matts* v. *Hawkins*, 5 Taunt. 22.

(*d*) *Vowles* v. *Miller*, 3 Taunt. 137.

(*e*) *Voyce* v. *Voyce*, Gow. 201.

exclusively to him on whose side the earth is found to be thrown up. Every hedge which separates two estates is reputed common to both, unless there be only one of the estates in an inclosed condition, or unless there be vouchers or sufficient possession to prove the contrary (*f*).

Title to a pew in a church.—Churchwardens are not justified in dispossessing any one of a sitting in a pew in a church which he has enjoyed for some time, without giving notice of their intention, and offering an opportunity for objection and explanation (*g*).

SECTION III.

OF ACTIONS FOR TRESPASSES UPON LANDS AND TENEMENTS.

Of actions against the hundred for damage done to tenements by rioters.—By 7 & 8 Geo. 4, c. 31, s. 2, it is enacted, that if any church or chapel, house, stable, &c., or any building or erection used in any trade or manufacture, or in conducting the business of any mine, or any engine or machinery employed in any manufacture, or in working any mine or any bridge, waggon-way, &c., or trunk for conveying minerals, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously assembled together, the inhabitants of the hundred shall, if the damage done exceeds 30*l.*, be liable (s. 8) to yield full compensation to the persons damnified by the offence, and also for any damage which may at the same time be done to any fixture, furniture, or goods, in any such church, chapel, house, or buildings. Under this statute a borough is liable to contribute, as part of the hundred, to the damage done, notwithstanding the provisions of the Municipal Corporation Act (*h*). But before an action can be maintained, the persons damnified, or such of them as have knowledge of the circumstance of the offence, or the servant or servants who had the care of the property damaged, must, within seven days after the offence, go before some neighbouring justice of the peace, having jurisdiction over the locality of the offence, and state upon oath the names of the offenders, if known, and submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance to prosecute, &c.; but every such action must be commenced within three calendar months after the commission of the offence.

No action can (s. 8) be maintained against the hundred in cases where the damage done does not exceed 30*l.*, but the party damnified must

(*f*) Cod. Nap. Liv. 2, No. 666–672. 278.
(*g*) *Horsfall* v. *Holland*, 6 Jur. N. S. (*h*) *Birley* v. *Salford*, 11 M. & W. 399.

hand in a notice of claim to the high constable of the hundred, who is to exhibit such claim to two justices of the peace, who are to appoint a petty session for the purpose of hearing and determining such claim.

Parties to be made plaintiffs in actions for trespasses — Heirs-at-law. — The heir-at-law cannot maintain trespass for an injury to lands descended to him without entry; but, after entry, his right of possession relates back so as to support an action against a wrong-doer for a trespass committed at an antecedent period (*i*).

Tenants-in-common.—An action is maintainable by one tenant-in-common against his co-tenant, or the licensee of the latter for digging up and carrying away the soil of the close of which they are tenants-in-common. In such an action, a plea that the close is not the close of the plaintiff is not supported by proof that the plaintiff is tenant-in-common of it, with others who authorized the trespass (*k*). One tenant-in-common also may sue his co-tenant-in-common in trespass for turning him or his servants off the land, or out of the house holden in common (*l*).

Tenant and reversioner.—The actual occupier of real property is always entitled to maintain an action for unjustifiable trespasses thereon; but the owner, who has parted with the possession in favour of a tenant or lessee, cannot maintain an action for a trespass. But if an injury is done to his reversionary estate, he is entitled to an action on the case for damages. If a house or land is occupied merely by the servant of the owner, the occupation of the servant is the occupation of the owner (ante, p. 227), and the latter, being then the occupier as well as the owner, may sue for any temporary trespass or injury, rendering his occupation less profitable or commodious; but where the land has been demised to a lessee, who has entered thereon, and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for a trespass upon the property, unless the wrongful act complained of imports a damage to the reversionary estate (*m*). Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that if the landlord or reversioner was to sell it, it would fetch less money in the market, there is, as we have seen, a damage to the reversionary estate, in respect of which the reversioner may maintain an action (*n*). "The removal of the smallest portion of soil must, in general, be esteemed an injury to the reversion, because it tends to alter the evidence of title" (*o*).

(*i*) *Bartlett* v. *Earl Guildford*, 11 Exch. 19; 24 Law J., Exch. 281.

(*k*) *Wilkinson* v. *Haygarth*, 12 Q. B. 837; 16 Law J., Q. B. 103.

(*l*) *Murray* v. *Hall*, 7 C. B. 454; 18 Law J., C. P. 161.

(*m*) *Dobson* v. *Blackman*, 9 Q. B. 991.

(*n*) Ante, pp. 54, 121, 168. As to injuries from the removal of fixtures, *Hare* v. *Horton*, 5 B. & Ad. 727.

(*o*) Per Cur. *Alston* v. *Scales*, 9 Bing. 4.

In the case of permanent injuries to buildings, from trespasses or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property (*p*). Where trees have been injured by a stranger, the lessor and the lessee may both sue in respect thereof; the lessor for the damage done to the body of the tree, the lessee for the loss of the shade and fruit (*q*). So may the copyholder and the lord (*r*). But the reversioner cannot, as we have seen, maintain an action against a stranger for entering upon his land in the occupation of his lessee, and with carts and horses trampling down the soil and grass, though the entry be made in the exercise of an alleged right of way, as the act is not attended with any permanent injury to the reversion. "Such an act," observes Parke, J., "done while the premises were out on lease, would not be evidence of any right as against the reversioner" (*s*).

If several parties are entitled to the reversion as joint-tenants, parceners, co-heirs in gavelkind, all of them should be joined, as we have seen (ante, p. 54), as plaintiffs in an action for an injury to the reversion (*t*). So, if there are several occupiers or tenants of the injured property, all should be made plaintiffs in an action for damage done to the possessory interest in the premises. Tenants-in-common also "should join in actions personal, as trespass in breaking into their house, breaking their inclosure or fences, feeding, wasting, or defouling their grass, cutting down their timber, fishing in their piscary, &c., and shall recover jointly their damages, because in those actions, though their estates are several, yet the damage survives to all, and it would be unreasonable to bring several actions for one single trespass" (*u*).

Parties to be made defendants.—Actions for trespasses, and injuries to real property, may be brought either against the hand actually committing the injury, or against the party by whose order or authority the act was done. A master is liable, as we have seen, for any act done by his servant in the course of executing his orders; and, therefore, where a master ordered his servant to lay some rubbish near his neighbour's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish nevertheless ran against the wall, it was held that the master was liable in trespass (*x*). But to render the master liable for the trespass of the servant, the servant

(*p*) *Hosking* v. *Phillips*, 3 Exch. 168; post, s. 2, *Damages*.
(*q*) *Bedingfield* v. *Onslow*, 3 Lev. 209.
(*r*) *Jefferson* v. *Jefferson*, ib. 131.
(*s*) *Baxter* v. *Taylor*, 4 B. & Ad. 75; ante, p. 121.
(*t*) Bac. Abr. JOINT-TENANTS, K. *Deering* v. *Moor*, Cro. Eliz. 554. Ante, pp. 54, 169.
(*u*) Bac. Abr. JOINT-TENANTS, K; post, ch. 20.
(*x*) *Gregory* v. *Piper*, 9 B. & C. 591; 4 M. & R. 500.

must, as we have seen (ante, p. 21), be acting in the execution of the master's business, or for the master's benefit.

If fences are allowed to go to ruin, and cattle escape and trespass upon the adjoining land, the action for the injury must be brought against the owner of the trespassing beasts, or the party who is by law bound to uphold the fence (ante, p. 102). An action for the non-repair of fences cannot be supported against the landlord when the land is in the possession of a tenant; for it is, as we have seen, the duty of the actual occupier to repair and maintain fences, and not the duty of the landlord (*y*).

Where several persons have been jointly concerned in the commission of a trespass, they may, in general, be sued jointly as principals, or the plaintiff may sue any of them separately at his election (*z*).

Declaration for trespasses upon land.— Venue.—The rule that the name of the county from which the jury are to come to try the action is to be stated in the margin of the declaration (post, ch. 21), does not apply to actions for trespass to land, where the place in which the trespass was committed is described in the body of the declaration. The cause of action for an injury to realty is local, and must, unless the venue is changed by judge's order, be tried in the county where it arises, and where the property is situate; but any defect in naming the place of trial, or laying the venue, is cured by the statute 16 & 17 Car. 2, c. 8 (*a*). The close or place in which the trespass was committed must be designated in the declaration by name, or abuttals, or other description, or the plaintiff may be ordered to amend with costs, or give such particulars as the court or judge may think reasonable (*b*). The description should correspond with the state of the premises at the time of the commission of the trespass, and not at the time of the making the declaration (*c*). It should be reasonably accurate, and the name and situation of the close should be specified (*d*), and the trespass must be proved to have been committed at the place named (*e*). When there is a general district of land known by one general name, and there are several occupiers in the same district, each person may call his own part of the district by the general name (*f*).

The plaintiff may allege generally, "that the defendant broke and entered certain land of the plaintiff, called, &c. and depastured the same

(*y*) *Cheetham* v. *Hampsom*, 4 T. R. 318.

(*z*) Ld. Kenyon, C. J., *Mitchell* v. *Tarbutt*, 5 T. R. 651; post, ch. 20.

(*a*) *Simmons* v. *Lillystone*, 8 Exch. 441; 22 Law J., Exch. 218. *Warren* v. *Webb*, 1 Taunt. 379.

(*b*) Reg. Gen. 16 Vict. 18; 1 Ell. & Bl. App. lxxxii.

(*c*) *Humfrey* v. *Lond. & North-Western Rail. Co.*, 7 Exch. 325; 22 Law J., Exch. 149.

(*d*) *Cocker* v. *Crompton*, 1 B. & C. 489.

(*e*) *Simmons* v. *Lillystone*, 8 Exch. 441; 22 Law J., Exch. 218.

(*f*) *Cooke* v. *Jackson*, 9 D. & R. 496.

with certain cattle" (*g*). If special damage has resulted to the plaintiff from excavations made by the defendant in the soil of the plaintiff, the nature of the damage should be stated (*h*).

In an action against the hundred to recover compensation for the felonious demolition of a house, building, or erection, the same strictness of averment and proof is required as on the trial of an indictment for felony (*i*).

If the plaintiff declares as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto; and the want of such an allegation is cause for arresting the judgment (*k*).

What may be given in evidence under the plea of not guilty.— In actions for trespasses upon land, the plea of not guilty operates as a denial of the defendant's having committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place which, if intended to be denied, must be traversed specially. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration; and all matters in justification, and in confession, and avoidance of the cause of action, must be pleaded specially (*l*).

Of pleas denying the plaintiff's title or right of possession.— If the defendant intends to dispute the plaintiff's right of possession of, or title to, the land or messuage on which the trespass is alleged to have been committed, he must plead a plea, alleging that such land or messuage was not the land or messuage of the plaintiff, or a plea of *liberum tenementum*, which is a plea alleging that such close or land was the soil and freehold of the defendant. Under the plea that the land or messuage is not the plaintiff's, both the possession and title are in issue (*m*); but this is not the case with the plea of *liberum tenementum*, which admits the plaintiff's possession, but denies his title (*n*). Under these pleas, the defendant may show that the plaintiff is the trespasser, and not the defendant (*o*).

Of the plea of liberum tenementum, or plea of freehold.— The plea of *liberum tenementum* is a plea alleging that the close or land in which the trespass was committed was the soil and freehold of the defendant. This plea, as it has justly been observed, though held valid on account of long

(*g*) 15 & 16 Vict. c. 76, Sched. Whether the beasts get there from being driven there by the plaintiff, or whether they go there of their own accord, from want of proper custody exercised over them, "is all one," ante, pp. 102, 222.

(*h*) Ante, pp. 55, 124.

(*i*) *Burwell* v. *Winterstoke*, 14 Q. B. 708.

(*k*) *Baxter* v. *Talyor*, 4 B. & Ad. 74. *Jackson* v. *Pesked*, 1 M. & S. 234.

(*l*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.; post, ch. 21.

(*m*) *Jones* v. *Chapman*, 2 Exch. 803; 18 Law J., Exch. 456; overruling *Whittington* v. *Boxall*, 5 Q. B. 143.

(*n*) *Slocombe* v. *Lyall*, 6 Exch. 119.

(*o*) *Burling* v. *Read*, 11 Q. B. 908; 19 Law J., Q. B. 291.

usage, is bad in reasoning, because the defendant may be a trespasser, though he is himself the freeholder; and to make the plea a consistent defence, it has been held that it admits such a possession in the plaintiff as would enable him to maintain the action against a wrong-doer, and to assert a freehold in the defendant, with a right to the immediate possession, as against the plaintiff (*p*). The plea was originally invented for the purpose of driving the plaintiff to prove his title to the land in dispute. It is a good plea to a declaration, which states only in general terms that the defendant, with a strong hand and against the form of the statute, broke and entered the plaintiff's dwelling-house, as the expressions, "with a strong hand and against the form of the statute," are mere matters of aggravation, and not of substantive charge (*q*). And if the declaration goes on to charge the defendant with having expelled the plaintiff from the dwelling-house, and seized and removed his goods, the plea covers and justifies the expulsion and removal of the goods, as well as the breaking and entering the house (*r*); but such a plea is no answer to an assault upon the person (*s*).

Replication — Estoppel. — To a plea of *liberum tenementum* the plaintiff may reply, that the defendant ought not to be admitted to plead the plea, because, &c. (showing some ground of estoppel); and the defendant must answer the replication by a rejoinder: but if a party means to insist on an estoppel, he must take the first opportunity of doing so which the pleadings afford him; if he fails to do this, he leaves the matter at large, so that the jury may decide upon the evidence before them, without regard to an estoppel (*t*).

Of the plea of leave and license — Equitable defence. — The form of the plea of leave and license is, that the defendant did what is complained of by the plaintiff's leave (*u*). Under this plea it may be shown that the plaintiff granted to the defendant a right to enter upon his land, or granted him a lease thereof, or a license to occupy, or leave to enter upon and take possession of the *locus in quo*, and expel the plaintiff therefrom (*x*). Proof may be given under this plea of an exception of timber-trees in a lease made by the defendant to the plaintiff, or a reservation in a parol demise of hedges, trees, and thorn-bushes, with the lop and top, giving the defendant a right to enter upon the land, for the purpose of cutting and carrying away the trees or the loppings of the hedges and bushes (*y*); or it may be shown that the plaintiff took the defendant's goods, and

(*p*) *Ryan* v. *Clark*, 14 Q. B. 71; 18 Law J., Q. B. 269.

(*q*) *Davison* v. *Wilson*, 11 Q. B. 902; 17 Law J., Q. B. 196.

(*r*) *Meriton* v. *Coombes*, 9 C. B. 787; 19 Law J., C. P. 336. *Taylor* v. *Cole*, 1 Smith's L. C. 95–110.

(*s*) *Roberts* v. *Tayler*, 1 C. B. 117.

(*t*) *Feversham* v. *Emerson*, 11 Exch. 385; 24 Law J., Exch. 254.

(*u*) 15 & 16 Vict. c. 76, Sched. B. No. 44.

(*x*) *Kavanagh* v. *Gudge*, 7 M. & Gr. 316; 7 Sc. N. R. 1025.

(*y*) *Hewitt* v. *Isham*, 7 Exch. 77; 21 Law J., Exch. 35.

carried them into his own land; whereupon the defendant entered upon the plaintiff's land, with his (implied) leave, and carried them back to the place from whence the plaintiff took them (*z*). If the plea does not extend to and cover the whole of the trespasses to which it is pleaded, the plaintiff will be entitled to judgment (*a*). Whenever a party has been induced to lay out money upon the land of another, upon the faith of a verbal agreement, that in consideration of the expenditure the party laying out his money shall enjoy an easement, privilege, or profit upon the land, the privilege cannot in equity be withdrawn, as we have seen, by the landlord, without tendering full compensation for the expenditure (*b*); but the verbal agreement or parol license is not pleadable, it seems, by way of equitable defence to an action for trespass, inasmuch as, to constitute a good equitable defence, the facts must be such as to entitle the defendant to absolute and unconditional relief, or to a perpetual injunction (*c*).

Special pleas of matters in confession and avoidance — Matters of excuse. — All matters in confession and avoidance are required to be specially pleaded (*d*), such as the defence that the defendant's cattle escaped from the defendant's land, and trespassed on the land of the plaintiff, through the neglect of the plaintiff to repair fences which he was bound by contract or by prescription to repair and maintain. Pleas of this sort must show how the obligation to repair arises (*e*).

Of pleas of justification of trespass. — Every defendant who justifies his entering or remaining upon the land of the plaintiff against his will, and, therefore, *primâ facie*, against right, is bound to show, on the face of his plea, such circumstances as establish his right in abridgement of the general rights of property (*f*). If he justifies his entry in the exercise and enjoyment of a profit à prendre, or an easement (ante, p. 63), he must set forth in his plea the foundation of his right, showing whether he claims by grant or by prescription, or under a mere personal license of pleasure, which extends only to the individual licensee, and cannot be exercised with or by his servants; or a license of profit, enabling his servants to justify under it (*g*).

If the party claims under a particular estate, he must in his plea aver the continuance of that estate. Thus, if he derives his title from a tenant-for-life, he must aver and prove the continuance of the life-inte-

(*z*) Vin. Abr. TRESPASS, 1a. *Patrick* v. *Colerick*, 3 M. & W. 485. As to breaking open an office to get at books and papers, see *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 Law J., Exch. 145.

(*a*) *Barne* v. *Hunt*, 11 East, 451.

(*b*) *Laird* v. *Birkenhead Rail. Co.*, Johns. 500; 1 Law T. R., N. S. 159. *Unity Joint-Stock Bank Min. Assoc.* v. *King*, 25 Beav. 70; 27 Law J., Ch. 585; ante, pp. 130, 131.

(*c*) *Hyde* v. *Graham*, 32 Law J., Exch. 27. Addison on Contracts, ch. 28, s. 2, 5th ed.

(*d*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.

(*e*) *Faldo* v. *Ridge*, Yelv. 74, 75; ante, p. 102.

(*f*) *Hayling* v. *Okey*, 8 Exch. 545.

(*g*) Ante, pp. 64, 65. *Wickham* v. *Hawker*, 7 M. & W. 78. *Moore* v. *Earl Plymouth*, 1 Moore, 346; 3 B. & Ald. 66.

rest (*h*). Every plea of justification of trespass must, of course, extend to and cover the whole of the trespasses intended to be justified (*i*); but it need not be pleaded to acts which are not relied upon as trespasses, but are mere matters of aggravation, and not of substantive charge (*k*). Where the declaration charges the defendant with breaking and entering the plaintiff's house, and expelling him therefrom, a plea of justification, showing a good cause for the breaking and entering, is a full answer to the declaration, for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff means to insist on the expulsion as making the defendant a trespasser *ab initio*, he must new assign it (*l*).

Justification of trespass under the powers and provisions of an act of parliament.— Where the plaintiff complained that the defendant had built a bridge which encroached upon and projected over the land of the plaintiff, it was held that the defendant might plead generally that the several acts, matters, and things of which the plaintiff complained were lawfully done by the defendant, in exercise and by virtue of the powers given to the defendant by an act of parliament, made, &c., and intituled, &c. (*m*). When the defendant justifies the demolition of a house under the powers and provisions of the Metropolis Local Management Act (*n*), it must be shown that the person damnified had an opportunity of being heard before the board prior to the exercise of the power (*o*).

Pleas justifying the breaking and entering a dwelling-house without warrant (*p*) to make an arrest for felony, or to prevent the commission of murder, must show, in the first case, that a felony had been committed, and that there was reasonable ground for believing that the felon was in the house (*q*); and, in the second case, that the life of some person inside the house was really in danger; that there were calls for assistance; that the door was fastened; and that it was necessary to break it open and enter the house, and render assistance for the preservation of life (*r*).

Of pleas of justification under a prescriptive title.— When the defendant justifies, under a prescriptive right, to enter and take a profit of the soil (ante, pp. 91–103), he must set forth in his plea an enjoyment as of right, and without interruption for the full period of thirty years before the commencement of the action (*s*). And when he claims only an easement,

(*h*) *Dayrell* v. *Hoare*, 12 Ad. & E. 368.

(*i*) *Curlewis* v. *Laurie*, 12 Q. B. 640.

(*k*) *Pratt* v. *Pratt*, 2 Exch. 413. *Davison* v. *Wilson*, 11 Q. B. 903.

(*l*) *Taylor* v. *Cole*, 3 T. R. 297; 1 Smith's L. C. 95–110.

(*m*) *Beaver* v. *Mayor, &c. of Manchester*, 26 Law J., Q. B. 311. *Watkins* v. *Gt. Northern Rail. Co.*, 16 Q. B. 961. As to the replication to this plea, see *Brine* v. *Gt. West. Rail. Co.*, 31 Law J., Q. B. 101; and post, ch. 16.

(*n*) 18 & 19 Vict. c. 120, s. 76.

(*o*) *Cooper* v. *Wandsworth Board, &c.*, 8 L. T. R., N. S., Q. B. 278; 11 W. R. 647.

(*p*) As to justification under warrant and in execution of legal process, post, ch. 18.

(*q*) *Smith* v. *Shirley*, 3 C. B. 142.

(*r*) *Handcock* v. *Baker*, 2 B. & P. 260.

(*s*) *Jones* v. *Price*, 3 Sc. 376; 2 Bing. N. C. 52. *Clayton* v. *Corby*, 2 Q. B. 813. *Holford* v. *Hankinson*, 5 Q. B. 584. *Cooper* v. *Hubbuck*, 9 Jur. N. S. 575.

he must set forth a similar enjoyment for the period of *twenty* years. The Prescription Act, 2 & 3 Wm. 4, c. 71 (ante, p. 94), enacts (s. 5) that in all pleadings where, before the passing of the act, the party claiming might by law have alleged his right generally, without averring the existence of the right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all the matters mentioned and provided in the act, which are applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all actions and pleadings wherein it would have been necessary, before the passing of the act, to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right*, by the occupiers of the tenement, in respect whereof the same is claimed, for such of the periods named in the act as may be applicable to the case; and if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or any matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the claimant (ante, p. 95). A person who pleads a right or privilege in gross, not annexed or appurtenant to an estate in land (ante, p. 77), must show something more than that he is in possession as occupier. He must show that he is either heir or assignee of the person to whom the right is supposed to have been granted (*t*).

The nature of the right should be correctly set forth on the face of the plea; and if the exercise of it is limited to a particular purpose, if it is a right, for example, to enter upon land for the purpose of digging stones and sand for the necessary repair of a dwelling-house, it should be so stated, and that the dwelling-house was out of repair (*u*). When the defendant justifies under a plea of a right of common, he must by his plea set forth the nature of the right, and show whether he claims by grant or prescription. If the right be subject to restriction or qualification as to the number of the cattle, or the time of enjoyment, it must be so stated (*x*). If the right claimed be a right of common by prescription for all commonable cattle, levant and couchant, upon a particular farm (ante, p. 85), the defendant should set forth by his plea that, at the time of the alleged trespass, he was possessed of a messuage, farm, or land, the occupiers whereof, for thirty years before the commencement of the action, enjoyed, as of right and without interruption, common of pasture over the land of the plaintiff for all their commonable cattle, levant and couchant, upon the messuage, farm, or land of the defendant at all times, or at all usual or customary times, of the year, as the case may be, and

(*t*) *Bailey* v. *Stevens*, 12 C. B., N. S. 91; 31 Law J., C. P. 226; ante, p. 80.

(*u*) *Peppin* v. *Shakespeare*, 6 T. R. 748.

(*x*) 1 Wm. Saund. 28, n. 4, 346b.

that the alleged trespass was a user by the defendant of the said right of common (*y*).

Pleas of justification in the exercise of a right of way.— When the defendant justifies under a plea of a right of way, he should show the nature of the right, and whether it is claimed by grant or by prescription, or as a way by necessity (ante, pp. 91–94) (*z*), setting forth in the last case the circumstance whereby the land over which the way is claimed became chargeable with the servitude (*a*). When the plea sets forth a title by prescription, it usually states that the defendant, at the time of the alleged trespass, was possessed of a messuage or land, the occupiers whereof, for twenty years before the suit, enjoyed, as of right and without interruption, a way on foot, and with horses, and carriages, and cattle, as the case may be, backwards and forwards from a certain public highway over the land of the plaintiff to the land of the defendant, at all times of the year, for the more convenient occupation of the messuage and land of the defendant, and that the alleged trespass was a user by the defendant of the said way (*b*). The plea need not name or describe by metes and bounds the lands and closes in respect of which the right is claimed. A general description is sufficient; and if the plaintiff wants detailed information, he must call for particulars (*c*). The nature of the right should be correctly stated; and if the enjoyment of it is limited to particular times or periods, or to particular purposes, it should be so stated in the plea (*d*). There is one difference between pleading a public and a private way. In the former case, it is not necessary to set out the termini; in the latter, both must be set out with certainty. It is not necessary, however, to set out the intervening closes over which the way passes (*e*).

To an action of trespass for deviating from a highway and trampling down the plaintiff's inclosure, a plea showing that the plaintiff himself stopped up the highway, so that the defendant could not pass, wherefore the defendant went over the plaintiff's close, doing as little damage as he could, constitute an answer to the action (*f*).

Replications traversing the prescriptive right set up by the defendant's pleas.— The fact of the defendant's having the right claimed by his plea may be put in issue by a replication traversing the allegation of the right as set forth in the plea. If the right is claimed by grant, and the answer is that the grant has ceased to operate, the replication must show in what

(*y*) 15 & 16 Vict. c. 76, Sched. pl. 47.

(*z*) *Howton* v. *Frearson*, 8 T. R. 50. *Buckby* v. *Coles*, 5 Taunt. 311.

(*a*) *Bullard* v. *Harrison*, 4 M. & S. 392. *Proctor* v. *Hodyon*, 10 Exch. 824.

(*b*) 15 & 16 Vict. c. 76, Sched. 46. *Jones* v. *Price*, 3 Bing. N. C. 52, 3 Sc. 376.

(*c*) *Holt* v. *Daw*, 16 Q. B. 995.

(*d*) *Higham* v. *Rabett*, 5 Bing. N. C. 624.

(*e*) *Simpson* v. *Lethwaite*, 3 B. & Ad. 233.

(*f*) *Absor* v. *French*, 2 Show. 28.

way the grant has ceased to operate (*g*). Though a prescription pleaded be larger than is necessary for the defendant's justification, the plaintiff must nevertheless traverse the whole of it. Since the Prescription Act, a plea setting up a right to a flow of water through a watercourse, and a right to enter upon the adjoining land for the purpose of cleansing and scouring the watercourse, is held to be a plea of the enjoyment of one entire prescriptive right, and is to be treated as one entire thing, and not as setting up two separate prescriptions. If a man pleads a prescriptive right to turn on cows, also a right to turn on horses, and for a right to turn on sheep, the plea sets up one entire right, and the plaintiff should traverse the whole (*h*).

Traverse of the enjoyment as of right and without interruption.—When the enjoyment as of right and without interruption is traversed by the plaintiff's replication, the defendant must show an uninterrupted rightful enjoyment, and his claim may be answered by proof of a license, written or parol, for a limited period, falling short of the period relied upon. Any evidence negativing the continued enjoyment as of right is admissible under this issue; and every time that leave is asked for and obtained there is a break in the continuance of the enjoyment (*i*), because each asking of leave is an admission that, at that time, the asker had no right. Hence it follows that, not only an asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section of the Prescription Act; for the party cannot and does not rely on it as an answer to an enjoyment as of right, which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not, at the time when the agreement was made, an enjoyment as of right, and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years (*k*).

If the plaintiff chooses to reply, and set up a tenancy-for-life, he excludes the time of that tenancy, and drives the defendant to show thirty years' enjoyment, either wholly before the tenancy-for-life, if it be still subsisting, or partly before and partly after, if it be ended. But it has been said, "What if there had been an interruption for two years during the tenancy-for-life, and within thirty years before the action, is the plaintiff to be deprived of the benefit of such interruption?" The answer is, "No: although the tenant-for-life cannot, by acquiescence, burthen the estate, he may, by resistance, free it; and if the plaintiff chooses to avail himself of that resistance, he may traverse the enjoyment

(*g*) *Parry* v. *Thomas*, 5 Exch. 41.
(*h*) *Peter* v. *Daniel*, 5 B. C. 568.
(*i*) *Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 631.
(*k*) *Tickle* v. *Brown*, 4 Ad. & E. 383. *Bright* v. *Walker*, 1 C. M. & R. 219; ante, pp. 105–108.

as of right for thirty years, and show the interruption." The defendant will not then be allowed to give the tenancy-for-life in evidence, in order to avoid the effect of the interruption (*l*).

Replications traversing the enjoyment of a right of way.—Under a replication denying that the defendant had used a way for forty years as of right and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment during any part of the time, as that it was used by stealth, or in the absence of the occupier of the close, and without his knowledge, or that the land was let on lease, and that the user and enjoyment were without the privity of the landlord, and that the latter had no means of knowing what was done upon the land to the prejudice of the inheritance, and could not therefore have prevented it (ante, p. 93), or that the enjoyment was a precarious enjoyment, by leave and license, or any other circumstances which negative the fact that it was a user and enjoyment as of right (*m*).

All acts showing that the defendant's user, although as of right and without interruption for the period specified, was not such a user as would, before the Prescription Act, have been sufficient to establish a claim by prescription or grant, must be replied specially, and cannot be given in evidence under a traverse of the right of way alleged in the plea (*n*).

Facts and circumstances which must be specially replied, and cannot be given in evidence under a general traverse of the enjoyment as of right and without interruption for the periods named in the Prescription Act.—By the fifth section of the Prescription Act (ante, p. 94), it is enacted that if the party resisting the claim "intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. The greatest difficulty," observes Lord Denman, "arises from the language of the concluding paragraph of this fifth section of the Prescription Act, and more particularly from the words, 'or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.' As all these matters are required to be specially pleaded, and forbidden to be given in evidence, under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and as by the rules of pleading and of logical reasoning, every allegation by way of answer which does not deny the matter to which it is proposed as an answer is taken to confess it, we must conclude that the legislature used the words 'as of right' in such a sense as that a party

(*l*) *Clayton* v. *Corby*, 2 Q. B. 825. (*m*) *Beasley* v. *Clarke*, 3 Sc. 263.
(*n*) *Kinloch* v. *Neville*, 6 M. & W. 795.

confessing the enjoyment as of right for forty years, or twenty, as the case may be, may account for and avoid the effect of it by alleging, in the one case, a consent or agreement, provided it be by deed or writing (see sec. 2), and in the other, any contract, &c. written or parol (see sec. 5). It follows that the words 'as of right' cannot be confined to an adverse right from all time, as far as evidence shows; for if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract which is not adverse.

Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to enjoyment under a strict legal right, for then a 'consent or agreement' in 'writing,' not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words 'claiming right thereto,' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the enjoyment as of right must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or, though not strictly lawful to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing, or parol consent or agreement, contract, or license, in case of a plea for twenty years (ante, p. 97). According to this view of the act, a license in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same of a parol license, in case of a plea for twenty years" (*o*).

Replication of the existence of a tenancy-for-life during part of the period of enjoyment relied upon by the plea.—Where there has been a thirty years' notorious enjoyment of a profit à prendre during a tenancy-for-life had with the knowledge and acquiescence of the owner of the fee, so as to be an enjoyment as of right within the statute against the inheritance (ante, pp. 97, 98), the tenancy-for-life must be specially pleaded by the reversioner, in order to exclude such thirty years' enjoyment from the computation of the prescriptive period under the statute. Thus where, in an action of trespass, the defendant pleaded an uninterrupted user and enjoyment of a profit à prendre for thirty years under s. 1 of 2 & 3 Wm. 4, c. 71, and the plaintiff, by his replication, traversed the enjoyment, and the defendant, at the trial, proved enjoyment for thirty years

(*o*) Per Cur. *Tickle* v. *Brown*, 4 Ad. & E. 382.

next before the action, it was held that the plaintiff was not at liberty to prove a tenancy-for-life during part of those thirty years, as he had not set it up, and relied upon it by his replication (*p*).

Rejoinder traversing the fact of the existence of the tenancy-for-life during part of the period of enjoyment.—If a tenancy-for-life during the thirty years' period be replied and traversed by the rejoinder, the defendant may insist that the thirty years' enjoyment alleged in the plea is made up of time preceding and following the tenancy-for-life (*q*).

Evidence at the trial—Proof of trespass.—If the plaintiff in his declaration has alleged that he is possessed of a close, and proves possession either of the surface or of the subsoil and minerals beneath the surface, he sustains his declaration (*r*). Under the plea of not guilty, the plaintiff must be prepared to prove the commission, by the defendant, his servants or agents, of the trespass of which he complains (*s*). Where it was proved that the plaintiff was tenant of certain rooms in the defendant's house, and that the defendant unlawfully locked the door and kept him out, it was held that the jury might infer that there had been an actual entry by the defendant into the plaintiff's rooms, so as to support an allegation in a declaration that the defendant broke and entered the rooms of the plaintiff and expelled him therefrom (*t*). To fix the defendant with a trespass committed by the hand of another, it must be proved that the act was done by command of the defendant, or that it was done for his benefit, and that he subsequently adopted and ratified the act (*u*).

Where the declaration alleged that the defendant entered the plaintiff's dwelling-house, and continued therein for eight days, it was held that the plaintiff was entitled to show a trespass committed by the defendant in the dwelling-house on any of those days, and that the plaintiff need not prove that the defendant continued there the whole time; but, when various subsequent acts of trespass are given in evidence, it ought to appear that they were all in continuation, or in furtherance of the original wrongful act (*x*).

Proof under a traverse of the plaintiff's possession, or right of possession, of the locus in quo.—If the defendant, by his plea, denies the plaintiff's possession, or right of possession, of the *locus in quo*, the plaintiff must be prepared with general evidence of actual or constructive possession at the time of the commission of the alleged trespass. If the soil and freehold of the *locus in quo* are proved to be in the plaintiff, the possession is also presumed to be in him, unless there be some evidence to the contrary (*y*), for possession follows the property when there is no actual possession in

(*p*) *Pye* v. *Mumford*, 11 Q. B. 675.
(*q*) *Clayton* v. *Corby*, 2 Q. B. 813.
(*r*) *Cox* v. *Glue*, ante, p. 46.
(*s*) Ante, p. 243. Com. Dig. TRESPASS.
(*t*) *Lane* v. *Dixon*, 3 C. B. 776.
(*u*) Ante, pp. 20–22; post, ch. 20, s. 2.
(*x*) *Percival* v. *Stamp*, 9 Exch. 174.
(*y*) Parke, B., *Hebbert* v. *Thomas*, 1 C. M. & R. 864.

another person (*z*). Actual or constructive possession, without proof of any title to the soil and freehold, is quite sufficient to support an action against a wrong-doer; for he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of title. A lessee of the vesture or herbage, or a purchaser of growing crops, who has a right to the use of the land for bringing the crops to maturity, and has, consequently, an interest in the soil, may maintain an action for a trespass upon his close or land against any person who wrongfully comes upon the land, or interferes in any way with the growing crops (*a*); but a purchaser of crops arrived at maturity, who has bought them with a view to their immediate severance as chattels, and has no interest in the soil, cannot maintain an action for a trespass upon the land, but must confine his cause of action to a claim for damages for an injury to goods and chattels (*b*).

Very slight evidence of possession is sufficient to establish a *primâ facie* title to sue for an injury to realty, such as the occupation of the soil with stones and rubbish, which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation, or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption, and is then knocked down (*c*); or the inclosure or cultivation of a piece of waste ground, the mowing of the grass thereof, or the pasturing of a cow thereon for mere occupancy of land, however recent, gives a good title to the occupier, whereon he may recover as against all who cannot prove an older and better title in themselves (*d*). The digging of pits in a common, and throwing out heaps of earth, are *primâ facie* proof of ownership of the heaps cast out, so as to support an action against a wrong-doer for carting away the heaps (*e*).

A mere intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession; but he cannot maintain any action in which it would be necessary to prove title (*f*).

To maintain the action, however, there must in all cases be proof, either of title or of actual or constructive possession by the plaintiff at the time the trespass was committed. Where, therefore, the plaintiff held some marsh-land under a tenant-for-life, so that his interest ceased on the death of the tenant-for-life, and at the time of the determination of the life-interest, and down to the time of the commission of the trespass,

(*z*) *Rex* v. *Mayor, &c. of London*, 4 T. R. 26.

(*a*) *Crosby* v. *Wadsworth*, 6 East, 609.

(*b*) *Parker* v. *Staniland*, 11 East, 366. *Evans* v. *Roberts*, 5 B. & C. 837.

(*c*) *Every* v. *Smith*, 26 Law J., Exch. 345. *Dyson* v. *Collick*, 5 B. & Ald. 600; 1 D. & R. 225.

(*d*) *Catteris* v. *Cowper*, 4 Taunt. 547. *Matson* v. *Cooke*, 6 Sc. 184; 4 Bing. N. C. 392.

(*e*) *Northam* v. *Bowden*, 11 Exch. 72.

(*f*) *Harper* v. *Charlesworth*, 4 B. & C. 589.

and the commencement of the action, the plaintiff had no servants or cattle, or anything upon the land to show that he continued in possession of it, it was held that there was no proof that he was possessed of the land, and that his action was not maintainable (*g*).

Where certain commissioners of sewers placed a dam in a public navigable river, the soil or bed of which was not vested in them, it was held that they had no such possession of the dam as would enable them to maintain an action against a wrong-doer for pulling it down (*h*). But if it be proved that contractors or commissioners of public works have got the permission of the owner of the soil for the erection of their works, or it be shown that they and their servants were in the actual possession of the works at the time of the commission of the trespass, this will be sufficient to enable them to maintain the action (*i*).

Where a landowner gave the plaintiff license or permission to build a bridge on the land of such landowner, for the use of the public, and the plaintiff built the bridge, and the defendant afterwards removed the parapets and carried away the stones, it was held that, on the severance of the stones from the land, they became chattels, the property in which was vested in the plaintiff, and that he was entitled to maintain an action against the defendant for carrying them away (*k*).

Navigation commissioners authorized by statute to make a river navigable and form towing-paths, on making compensation to the adjoining landowners, have no such possession of the soil of the towing-path, or of the artificial river-banks formed by deepening the river, and throwing out the soil from the bed to the sides of the stream as will enable them to maintain an action for a trespass for cutting down trees growing in the soil of the towing-path or the banks, although they may have been in the habit of repairing, mowing, and trimming the banks, and exercising acts of ownership over them (*l*).

Proof of the possession of the key of a building is no proof of the possession of the building itself (*m*).

If the plaintiff has come into the possession of the land after the trespass was committed, the trespass is not a trespass against him, and he cannot maintain an action in respect of it (*n*), unless it is a continuing trespass (*o*).

Heir-at-law.—To sustain an action by an heir-at-law for trespasses committed upon land descended to him, where he is not in possession of the land, but the action is brought against a trespasser who contests his

(*g*) *Brown* v. *Notley*, 3 Exch. 221; 18 Law J., Exch. 39.
(*h*) *Duke of Newcastle* v. *Clark*, 8 Taunt. 621.
(*i*) *Dyson* v. *Collick*, 5 B. & Ald. 600.
(*k*) *Harrison* v. *Parker*, 6 East, 154.
(*l*) *Hollis* v. *Goldfinch*, 1 B. & C. 218; ante, pp. 70, 230.
(*m*) *Revett* v. *Brown*, 5 Bing. 7.
(*n*) *Pilgrim* v. *Southamp. &c. Rail. Co.*, 18 Law J., C. P. 332.
(*o*) *Holmes* v. *Wilson*, 10 Ad. & E. 503.

title, there must be proof of entry by the heir, and, after entry, his right of possession relates back, so as to support an action against a wrong-doer for a trespass committed at an antecedent period (*p*).

Proof of disseisin and re-entry.—If one disseises me, and during the disseisin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him for the trees, grass, corn, &c.; for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me (*q*). By his re-entry the disseisee is remitted to his first possession, as if he had never been out of possession (*r*). A person, therefore, who has the freehold and a right to the possession of land may, by a peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for a trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land (*s*). It is not necessary that the party who makes the entry should declare that he enters to take possession. It is sufficient if he does any act to show his intention, and, having regained constructive possession by his peaceable entry upon the unlawful possession of the occupier, and being entitled to treat the latter as a trespasser, all those who come upon the land without title, after such vesting of possession, are trespassers, and liable to be sued as such. If a landlord, having a right to the possession of land on the expiration of a lease, sends his agent to the land to demand possession, and the agent enters and makes the demand, this is a sufficient entry to clothe the landlord with the constructive possession, so as to enable him to sue in trespass all persons who subsequently come upon the land by the authority of the tenant (*t*).

Evidence for the defence.—Under a traverse of the allegation in the declaration for a trespass, that the close was the close of the plaintiff, the defendant is at liberty to show title in himself, or some other person under whose authority he claims to have acted (*u*).

If the defendant relies upon a plea of *liberum tenementum* (ante, p. 244), he must prove that the land whereon the alleged trespass was committed was his own soil and freehold, and that he was entitled to the possession of it as against the plaintiff. By this plea the defendant admits, as we have seen, that the plaintiff is in possession, and that he himself is, *primâ facie*, a wrong-doer; but he undertakes to show a title in himself which shall do away with the presumption arising from the plaintiff's possession. He may do this either by showing title by deed in the usual way, or by

(*p*) *Barnett* v. *Earl of Guildford*, 24 Law J., Exch. 281; 11 Exch. 19.
(*q*) *Liford's* case, 11 Co. Rep. 51a.
(*r*) *Holcome* v. *Rawlins*, Moore, 461.
(*s*) *Butcher* v. *Butcher*, 7 B. & C. 402; 1 M. & R. 220. *Litchfield* v. *Ready*, 5 Exch. 939.
(*t*) *Hey* v. *Moorhouse*, 8 Sc. 168; 6 Bing. N. C. 52.
(*u*) *Jones* v. *Chapman*, 2 Exch. 812.

proving a possessory title for twenty years (*x*). If, under this plea, the defendant establishes a title to that part of the close on which the alleged trespass was committed, he will be entitled to a verdict; for he is not bound to prove a title to the whole close, unless he has upon the record expressly undertaken to prove the whole close to be his soil and freehold (*y*).

When the plaintiff has in his declaration described by name or by abuttals the close in which, as he alleges, the trespass was committed, and the defendant pleads *liberum tenementum* generally, the defendant cannot, by showing that he himself is possessed of a close of the same name and in the same vill, turn the plaintiff round, and prevent him from proving a trespass in his own close, as named in the declaration (*z*). The defendant must make out his title to the freehold on the very spot described in the declaration; and, on his proving a *primâ facie* right to enter the close because it is his freehold, it will be competent to the plaintiff to prove that it has been demised to him, and to show his lease, if he have one (*a*). Where separate trespasses are alleged to have been committed in three different closes specifically described in the declaration, and the defendant, by his plea, says, in effect, that each of them was his own soil and freehold, the issues will be taken distributively, so that the plaintiff may have a verdict as to one close, and the defendant as to another (*b*).

Proof of leave and license.—If the defendant relies upon a plea of leave and license, he must prove either an express permission from the plaintiff to the defendant to come upon the land (*c*), or circumstances from which such a permission may fairly be implied (*d*). If, after a parol license to use a way has been granted, the licensor locks a gate across the way, this is a revocation of the license, and the licensee cannot lawfully break open the gate to use the way (*e*). A licensee can, of course, take no better title or authority than the licensor himself possesses: and, therefore, if one tenant-in-common gives to the defendant license or permission to dig and carry away soil, or brick-earth, or turf, from the estate holden in common, this will give the defendant no right or title as against the other co-tenant-in-common, and will afford no answer to an action brought by the latter for a trespass (*f*). If the license or permission of the wife, daughter, or servant of the plaintiff has been obtained by the defendant, this will be no evidence of a license from the plaintiff, unless the surrounding circumstances show that the wife, daughter, or servant

(*x*) *Brest* v. *Lever*, 7 M. & W. 595.
(*y*) *Smith* v. *Royston*, 8 M. & W. 386.
(*z*) *Cocker* v. *Crompton*, 1 B. & C. 491. *Lemprière* v. *Humphrey*, 3 Ad. & E. 186.
(*a*) *Harvey* v. *Brydges*, 14 M. & W. 441; 1 Exch. 261.
(*b*) *Phythian* v. *White*, 1 M. & W. 223.
(*c*) *Kavanagh* v. *Gudge*, 7 M. & Gr. 316.
(*d*) *Ditcham* v. *Bond*, 3 Camph. 524.
(*e*) *Hyde* v. *Graham*, 32 Law J., Exch. 27.
(*f*) *Wilkinson* v. *Haygarth*, 12 Q. B. 846.

had the plaintiff's express or implied authority to grant the license (*g*). Under a general plea of leave and license, the defendant is bound to prove a license co-extensive with all the acts of which the plaintiff complains; for if some of these acts are not covered and authorized by the license, the plaintiff will be entitled to damages in respect of them. A license to a defendant to have the key of a house, and to enter it when he pleases, will not authorize the defendant to enter the house otherwise than by the door, in the ordinary way. If, therefore, the defendant, having lost the key, enters the house by a window, he commits a trespass; and if evil-disposed persons, following his example, get into the house through the same window, and rob the house, the defendant will be responsible for the damage done (*h*).

Where a man is licensed to do a thing, it necessarily implies that he may do everything without which the thing authorized to be done cannot be done (ante, p. 68). If, therefore, the plaintiff has authorized the defendant to sell furniture and effects in the plaintiff's house, the license extends to all such assistants as may be necessary to enable the plaintiff to effect the sale and remove the goods (*i*). A plea of leave and license is not supported by proof that the plaintiff sold to the defendant certain goods and chattels which were deposited on the plaintiff's premises, and that the defendant entered upon the premises to remove the goods, for there is no implied authority to a purchaser to enter upon the vendor's land and help himself to the goods. There must be an express agreement to that effect (*k*).

A license obtained by wilful misrepresentation and deceit is a mere nullity, and will not justify or excuse a trespass by a defendant who was a party to the misrepresentation (*l*). And if there has been a mistake and misunderstanding between the parties without fraud, the license will be a nullity (*m*), but the misunderstanding will go in reduction of damages in an action for the unintentional trespass. Under a replication denying the fact of the license, the plaintiff may prove that it was revoked, with notice to the defendant prior to the commission of the trespass (*n*). A parol license to enjoy an easement over or upon the soil and freehold of another is at once determined, as we have seen, by a transfer of the property, and the grantee of the license is consequently a trespasser if he afterwards enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer (*o*).

(*g*) *Tayler* v. *Fisher*, Cro. Eliz. 246. *Holdringshaw* v. *Rag*, ib. 876.

(*h*) *Ancaster* v. *Milling*, 2 D. & R. 714.

(*i*) *Dennett* v. *Grover*, Willes, 195.

(*k*) *Williams* v. *Morris*, 8 M. & W. 488.

(*l*) *Roper* v. *Harper*, 4 Bing. N. C. 20.

(*m*) *Bridges* v. *Blanchard*, 1 Ad. & E. 551.

(*n*) *Adams* v. *Andrews*, 15 Q. B. 291. *Barnes* v. *Hunt*, 11 East, 451; ante, pp. 64, 65.

(*o*) *Wallis* v. *Harrison*, ante, pp. 77–81.

Proof of pleas of justification.—If the defendant has pleaded a plea justifying the trespass in the exercise of a privilege, profit à prendre, or easement, he must prove his right or title to the enjoyment of the incorporeal hereditament, either under an express or implied grant (ante, pp. 66–76), or by prescription (ante, pp. 91–96); and he must make out his justification as to that part of the close named in the declaration in which the trespass is proved to have been committed (*p*); but it is not necessary, in support of pleas of user and enjoyment under the Prescription Act, to show an actual exercise of the right in the very spot, when it is parcel of a larger tract. It is sufficient to show user and enjoyment over the larger tract under such circumstances, that it may reasonably be inferred that the right extended over the whole of the larger tract, including the spot in question (*q*).

Proof of right of way — Pleas of justification.—If the defendant justifies in the exercise of a right of way (ante, pp. 68, 98, 113, 118), he must prove a right co-extensive with the right claimed (*r*). If he proves a larger and more extensive right than he claims, but the right claimed is included in the more extended right proved, there is, as we have seen, no variance. Thus, a plea of a right of foot-way is supported by proof of a right of way for carts or carriages, as a carriage-way always includes a foot-way (*s*). A plea of a right of way in the occupiers of certain premises may be established by proof that the defendant is seised of a freehold or copyhold estate in such premises, and that they are in the occupation of a tenant to whom he has demised them; for a landlord may be constructively an occupier so as to give him a right to use a way appurtenant to his own premises, although those premises are in the possession of a tenant. The landlord of a tenement to which a right of way is appurtenant may, while the tenement is in the occupation of a tenant, lawfully use the way to remove an obstruction, and to assert the right of way, or to view waste, or to demand rent, or for any other purpose connected with the exercise of his rights or duties as a landlord (*t*).

A justification of trespass, under a custom for all the inhabitants of a particular town to walk and ride over a close of arable land at all seasonable times in the year was holden bad, because it appeared that the trespass was committed when the corn was standing, and it was held that "seasonable time" was partly a question of law and partly of fact (*u*).

Proof of deviations extra viam in the case of private ways.—When a way has once been assigned, or a prescriptive right to go in any particular direction established, the course or direction of the way cannot be altered

(*p*) *Bassett* v. *Mitchell*, 2 B. & Ad. 105. *Wood* v. *Wedgewood*, 1 C. B. 277.
(*q*) *Peardon* v. *Underhill*, 16 Q. B. 123.
(*r*) *Brunton* v. *Hall*, 1 Q. B. 792.
(*s*) *Davies* v. *Stephens*, 7 C. & P. 571; ante, p. 127.
(*t*) *Proud* v. *Hollis*, 1 B. & C. 9; 2 D. & R. 31.
(*u*) *Bell* v. *Wardell*, Willes, 202. *Mounsey* v. *Ismay*, ante, p. 82.

by one party without the consent of the other. A grant of a right of way to and from a particular dwelling-house, coach-house, and stables, will not enable the defendant to go to and from an adjoining spot which he can reach from the same line of road. If there be a grant of a way to a particular corner of a field, the grantee can go to no other part (*x*). Where T had a way over the close of H, and H ploughed and sowed his close, leaving a way in an unploughed place in the same close, it was held that T was not bound to use the new unploughed way, but was entitled to go where the ancient way was. H may, however, use the new way as long as it lies open; but if the owner afterwards stops up the new way, he has no right to remove the obstruction and pass along it (*y*). In the case of a public highway out of repair, passengers have a right to go upon the adjoining land, but this is not the case with a private way. If the passenger deviates, he commits a trespass (*z*).

If a man has a right of way to a close called A, he cannot justify using the way to go to A, and from thence to another close of his own adjoining to A (*a*).

Proof of a public right of way.—Nothing done by a lessee, without the knowledge or consent of the owner of the fee, will, as we have seen (ante, p. 187), give a right of way to the public; and the public can take no larger or more extensive right of way than the owner of the fee thinks fit to grant or to allow. "They must take *secundum formam doni*, and if they cannot take according to that, they cannot take at all. If a restriction cannot by law exist as to a public way, then the grant is only a license revocable." Where, therefore, a landowner suffered the public to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a limited dedication of the road to the public, or no dedication at all, but only a license revocable; and that a person carrying coals along the road, after notice not to do so, was a trespasser (*b*).

Proof of a right of way over vacant or waste strips of land extending alongside a public thoroughfare.—"When," observes Lord Tenterden, "I see a space of fifty feet, through which a road passes between inclosures set out under an act of parliament, I am of opinion that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy, the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees inclose up to it,

(*x*) *Henning* v. *Burnett*, 8 Exch. 193.

(*y*) *Horne* v. *Widlake*, Yelv. 141; Noy, 128. *Reignolds* v. *Edwards*, Willes, 283. Ante, p. 113.

(*z*) *Taylor* v. *Whitehead*, 2 Doug. 747. *Bullard* v. *Harrison*, 4 M. & S. 393.

(*a*) 1 Roll. Abr. 391. (CHIMIN. PRIVATE) cited *Allan* v. *Gomme*, 11 Ad. & E. 770.

(*b*) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257. As to proof of dedication of way, see ante, pp. 183–188.

so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun" (*c*).

Proof of entry on the plaintiff's land for the purpose of depositing thereon the plaintiff's own goods, or removing therefrom the goods of the defendant.— In Roll's Abridgement it is said, "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action for trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff" (*d*). An entry on the plaintiff's land may be justified on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefore the defendant entered upon the plaintiff's land and took his goods back again (*e*); but the entry is not justifiable from the mere fact of the plaintiff's goods being on the defendant's land. It must be shown that they came there by the plaintiff's act (*f*).

Of the damages recoverable in actions for trespasses upon real property.— All damages which naturally result from the wrongful act of the defendant, and are directly traceable thereto, may be recovered by the plaintiff, if he claims them in the declaration (*g*). Where the plaintiff, being desirous of letting his house, placed the key under the control of the defendant, and the key having been carried away, the defendant got a ladder and entered the house through a bed-room window which had no fastenings, and showed some strangers over the house, and a few nights afterwards the house was entered, apparently by the same window, and valuable property of the plaintiff was stolen, it was held that the defendant was responsible in an action of trespass for the loss the plaintiff sustained by the robbery (*h*).

Trespasses on land after notice or warning not to trespass.— *Surrounding circumstances of aggravation* will materially influence the amount of damages to be recovered for a trespass upon land. Where the plaintiff, a gentleman of fortune, was shooting upon his estate, and the defendant, a banker and magistrate, and member of parliament, went up to the

(*c*) *Rex* v. *Wright*, ante, p. 189.

(*d*) *Cole* v. *Maundy*, 1 Roll. Abr. TRESPASS, 1 pl. 17, p. 566. *Rea* v. *Sheward*, 2 M. & W. 426.

(*e*) 3 Vin. Abr. TRESPASS, 1. As to breaking open a door to get at books and papers, see *Burridge* v. *Nicholls*, 30 Law J., Exch. 145. *Blades* v. *Higgs*, ib. C. P. 349.

(*f*) *Patrick* v. *Colerick*, 3 M. & W, 485. *Anthony* v. *Haney*, 1 M. & Sc. 306; 8 Bing. 186. *Williams* v. *Morris*, 8 M. & W. 488.

(*g*) Ante, pp. 58, 59, 129; and post, ch. 22.

(*h*) *Ancaster* v. *Milling*, 2 D. & R. 714.

plaintiff and told him he would join his shooting party, and the plaintiff declined, and ordered him off his land, and gave him notice not to shoot there; but the defendant swore that he would shoot there, and did so, and threatened and defied the plaintiff, and the jury gave 500*l.* damages, the Court refused to disturb the verdict. "I do not know," observes Gibbs, C. J., "upon what principle we can grant a rule for a new trial in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done,' would that be a compensation" (*i*)?

Where a landlord entered upon premises demised to his tenant, without asking the leave of the latter, and sold the timber-trees standing in the hedge-rows, and caused them to be felled, and cut up, and removed, and great damage was done to the growing crops of the tenant, and the latter brought an action against the landlord for damages, and recovered 100*l.* beyond the net value of the whole of the crops, the Court declined to interfere to have the amount of damages reconsidered, although they were of opinion that the jury had taken an exaggerated view of them (*j*).

Damages in respect of trespasses in dwelling-houses.—The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every wilful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or the person (*k*). "Rights of action of this sort are given," observes Lord Denman, "in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in the value of property may have occurred (*l*).

Assessment of damages in cases of injury to buildings.—The amount of damages to be recovered in an action of tort for the wrongful and malicious demolition of a house in the actual occupation of the owner, seems to be peculiarly for the consideration of a jury. The question for them to determine is, what sum of money will repair the injury done to the plaintiff by the loss of his house, and what sum will be required to replace the

(*i*) *Merest* v. *Harvey*, 5 Taunt. 441.
(*j*) *Williams* v. *Currie*, 1 C. B. 847.
(*k*) *Sears* v. *Lyons*, 2 Stark. 318.
(*l*) *Rogers* v. *Spence*, 13 M. & W. 581.

house, as nearly as practicable, in the situation and state in which it was at the time of the commission of the injury (*m*).

Assessment of damages for digging and carrying away coal and earth.—In an action for a trespass in taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance from the soil, and the trespasser cannot claim any deduction therefrom in respect of the expense incurred by him in getting the coals (*n*), unless there is a real disputed title. This value is the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth. The plaintiff is also entitled to compensation for all injury done to his soil by digging, and for the trespass committed in dragging the coal along the adit of his mine. The estimate of the loss from the removal of the coal depends upon the value of the coal at the time of its severance from the soil; and the defendant has no right to any deduction in respect of royalty payable by the plaintiff to the mine-owner on coals got from the mine (*o*).

Where an action was brought for digging into the plaintiff's close, and carrying away therefrom large quantities of earth, soil, &c., it was held that the plaintiff was entitled, by way of compensation, to what the land was worth to him, and not to the amount which would be required to enable the plaintiff to replace the soil which had been taken away (*p*).

Assessment of damages in respect of trespasses by diseased cattle.—If, in consequence of an unlawful entry of diseased cattle into the plaintiff's close, the plaintiff's cattle have become infected with the disease, this is matter of aggravation of damages, and may be recovered, if claimed in a declaration for the trespass (*q*).

Assessment of damages where the plaintiff has no certain or determinate interest in the property.—If the plaintiff is only tenant-on-sufferance or tenant-at-will, the damages may be merely nominal. Where a trespass, of which the plaintiff complained, consisted in pulling down a wall between the close of the plaintiff and an adjoining close of the defendant, in the doing of which a few bricks and some mortar fell upon the plaintiff's land, and no evidence was given as to the nature of the plaintiff's interest in the premises, and the jury gave 1*s.* damages, it was held, that as the plaintiff had not proved that he had any interest in the land beyond that which results from the bare possession, he had not shown himself to be entitled to any greater damages than the jury had given (*r*). But where the plaintiff proves that he is in the actual occupation and possession of the land and crops growing thereon, he will be entitled to recover exem-

(*m*) *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 282.
(*n*) *Martin* v. *Porter*, 5 M. & W. 352.
(*o*) *Wild* v. *Holt*, 9 M. & W. 672.
Morgan v. *Powell*, 3 Q. B. 283.
(*p*) *Jones* v. *Gooday*, 8 M. & W. 146.
(*q*) *Anderson* v. *Buckton*, 1 Str. 192.
(*r*) *Twyman* v. *Knowles*, 13 C. B. 224.

plary damages from trespassers who wrongfully enter upon the land, and trample down and injure the crops, although he is only tenant-at-will; for if a stranger subvert land leased at will, the lessee may bring an action against him and have damages for the profits; and the lessor may have another action, and recover damages for the destruction of the land (*s*). But as the injury consists of two parts, an injury to a temporary right in the lessee and to the permanent freehold of the lessor, the damages must be assessed with reference to their several interests; for where different persons have distinct rights in the subject-matter of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to another; nor can the satisfaction made to one be a bar to an action brought by the other (*t*).

Apportionment of damages as between tenant and reversioner (*u*).—In the case of injuries to trees, the damages from the immediate loss of the shade and fruits of the trees are recoverable by the occupier or lessee; the damage from the loss of the timber and body of the tree falls to the reversioner (*x*). To entitle the reversioner to damages, it must be shown that the trespass or injury for which he sues is of a permanent nature; for he is not entitled to sue, as we have seen (ante, pp. 54, 121), in respect of mere temporary trespasses, where the repetition of the act, without interruption, would not destroy any right of the reversioner, or establish any adverse right against him: but if the injury complained of is a damage to the inheritance, so that if the reversioner wanted to sell the reversion, the injury would lessen the value of it, substantial damages are recoverable. In an action for an injury to the plaintiff's reversionary interest, by pulling down a house in the occupation of the plaintiff's yearly tenant, it was held that the diminution in the saleable value of the premises was the true criterion of damage, and that the jury should consider how much less the land was worth in consequence of the loss of the house (*y*). The cutting and carrying away soil is a permanent injury to the reversioner, and an infringement upon his proprietary right, though no actual damage be done to the land (*z*).

Damages recoverable from one of several co-trespassers.—Where, in an action for a trespass by the defendant, with horses, &c., upon the plaintiff's land, it appeared that the defendant was the huntsman of the Berkeley hounds, and that he followed the hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, and destroyed the fences, and injured the crops, Lord Ellenborough held that the defendant was answerable for the whole of the damage, and directed

(*s*) 2 Roll. Abr. 551.
(*t*) Chambre, J., *Attersoll* v. *Stevens*, 1 Taunt. 194.
(*u*) Ante, pp. 58, 59, 130, 178, 179.
(*x*) *Bedingfield* v. *Onslow*, 3 Lev. 211.
(*y*) *Hosking* v. *Phillips*, 3 Exch. 168.
(*z*) *Alston* v. *Scales*, 2 M. & Sc. 6; 9 Bing. 3.

the jury not to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass, but according to the aggregate amount of mischief done by him, and his co-trespassers, and the hounds (*a*).

Damages recoverable from tenants who hold over wrongfully after the expiration of a notice to quit.—Where a tenant holds over, after the expiration of a notice to quit, the landlord is entitled to recover from him any reasonable damages and costs that may have been sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom he was prevented from delivering possession through the wrongful act of such tenant (*b*).

Prevention of trespasses by injunction. — The Court of Chancery will not grant an injunction against a temporary trespass by a mere wrong-doer, inflicting no permanent injury upon the property, and being only a source of temporary annoyance or discomfort, as there is ample remedy at common law for such injuries, and the wrong-doer may at once be turned off the land (*c*). But whenever trespasses have been repeated again and again, so as to become a nuisance, an injunction will be granted against the persevering wrong-doer (*d*). Neither will the court interfere to protect a dry, strict legal title to property held for the benefit of the public, where the holder has no beneficial enjoyment therefrom, and no real substantial injury has been done to the property (*e*). But where a trespasser comes upon land in the possession of the plaintiff or his tenants, and commits acts of destructive trespass, either by mining, or quarrying, or cutting down timber without a colour, or shadow, or pretence of title, and the property may be destroyed before you can arrest his proceedings at law, there is a case for an injunction (*f*). Whenever, also, the trespass is of such a nature that irreparable injury will be caused by the repetition of it, and the defendant repeats, or threatens to repeat it, an injunction will be granted to restrain him from so doing. Thus, where the defendant had removed stones protecting the plaintiff's sea-wall, and an action of trespass had been brought, and damages recovered, and the defendant after that began again to remove stones, and by so doing exposed the plaintiff's land to inundation, the court granted an injunction (*g*).

But the court will not interfere, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on, or otherwise molesting, his tenants in possession of the property (*h*), unless the de-

(*a*) *Hume* v. *Oldacre*, 1 Stark, 352; and see post, ch. 22.

(*b*) *Bramley* v. *Chesterton*, 2 C. B., N. S. 605.

(*c*) *Mortimer* v. *Cottrell*, 2 Cox, 205. *Att.-Gen.* v. *Hallett*, 16 M. & W. 581.

(*d*) *Coulson* v. *White*, 3 Atk. 21.

(*e*) *Wandsworth Board of Works* v. *S. W. Rail. Co.*, 31 Law J., Ch. 854.

(*f*) V. C. Wood, *Talbot* (*Earl*) v. *Hope Scott*, 4 Kay & J. 113. *Thomas* v. *Oakley*, 18 Ves. 186. *Cowper* (*Earl*) v. *Baker*, 17 Ves. 128. *Lonsdale* (*Earl*) v. *Curwen*, 3 Bligh, 168, n.

(*g*) *Chalk* v. *Wyatt*, 3 Mer. 688.

(*h*) *Best* v. *Drake*, 11 Hare, 369.

fendant is a pauper, and the wrongful acts are of such a nature that the recovery of damages at law would not constitute an adequate remedy (*i*). And when the assistance of the court is not invoked for the protection and preservation of property from depredation by a trespasser, but to prevent the enjoyment of a privilege, such as a right of way claimed on one side and denied on the other, the court will not interfere by injunction, but leave the parties to their legal remedy.

Thus, where a tramroad had been made by the defendants across the farm of the plaintiff's, with the license and permission of the occupying tenant, but without the knowledge and consent of the plaintiff, who resided at a distance, and the plaintiff filed a bill for an injunction to prevent the defendants from entering upon the land and using the tramway, the court refused to interfere. "The thing here complained of," observes the Lord Chancellor, has been done. The tramroad has, with the leave of the tenant in possession, been completed, and the court is asked by the bill to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it, and from interrupting the servants and workmen of the plaintiff in their attempts to destroy it. In other words, the court is virtually asked to eject the defendant, and authorize the plaintiffs themselves to take possession of the tramroad. The case originally may have been a case of waste—waste occasioned by the cutting of the tramroad and the laying the iron rails over the plaintiff's land; but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such (*k*).

(*i*) *Hodgson* v. *Duce*, 2 Jur. N. S. 1014.
(*k*) *Deere* v. *Guest*, 1 Myl. & Cr. 522.

CHAPTER VII.

OF TRESPASS AND CONVERSION OF CHATTELS—TITLE TO CHATTELS.

SECTION I.—*Of trespass and conversion of chattels.*—Trespass upon personalty—Conversion of chattels—Wrongful destruction of chattels—Conversion by purchasers without title—When a demand and refusal must be proved—Demand of goods not in the possession of the defendant—Demand of goods in the hands of public officers—Conversion of chattels by railway companies and bailees—Conversion of bills and notes, and negotiable securities—Conversion by one of several partners, joint-tenants, or tenants-in-common—Conversion by parties claiming a lien upon chattels—Extinguishment of liens.

SECTION II.—*Of the title to chattels personal.*—Title to chattels which have been increased in value by a wrong-doer—Title to timber severed from the inheritance—Title to chattels by finding—Title to game and animals feræ naturæ—Title of the hunter and the fisherman—Title by gift—Right to deeds, leases, bonds, and securities—Right of property in letters sent by post—Right of possession of deeds and securities as between trustee and cestui que trust—Title by purchase in market overt—Title by private sale—Colourable transfers—Title of innocent purchasers from fraudulent vendors—Title to chattels in the hands of bailees—Title by delivery order, by purchase from sheriffs—Title to bills and notes—Title of assignees of bankrupts—Transfers of property by bankrupts constituting an act of bankruptcy—Reputed ownership of bankrupts—What possession creates a reputation of ownership—Possession of chattels by manufacturers, workmen, depositaries, factors, and commission agents for sale—Possession by bankrupt cestui que trust and bankrupt trustees—Alteration of the right of property in chattels after recovery of judgment in an action for a conversion of them.

SECTION III.—*Remedies for the wrongful conversion of chattels.*—Recapture of goods wrongfully seized or stolen—Parties to actions for a conversion—Joinder of parties—Staying proceedings—Pleadings, defences, and evidence—When the defendant is estopped from disputing the title of the plaintiff—Evidence under pleas of justification—Assessment of damages.

SECTION I.

OF TRESPASS AND CONVERSION OF CHATTELS.

Trespass upon personalty.—If one man meddles with the goods and chattels of another, either by laying hold of, removing, or carrying away inanimate things, or by striking, chasing, or driving cattle, sheep, and domestic animals in which the owner has a valuable property, he is guilty of a trespass, and is responsible in damages, unless the act can be

justified on the ground that it was done in necessary self-defence of the person, or of property, or of one's absolute or relative rights, or in obedience to some legal or personal authority, or can be excused on the ground that it was the result of inevitable accident, or was caused by the negligent or wrongful act of the plaintiff himself (*l*); as where a man wrongfully suffers his cattle to trespass upon my land, or leaves thereon corn or hay which he ought to have removed, and his cattle get injured, or his corn or hay is eaten by my beasts. In these cases he has no remedy for the injury, as it was caused by his own default (*m*).

If a man's goods and chattels obstruct me in the exercise of my right of way, I have a right to remove them. If he places a horse and cart in the way of the access to my house, or before my door, so that I cannot drive up to it, I have a right to lay hold of the horse and lead him away, and, if necessary, to whip him to make him move on (*n*). So, if a person's goods are placed on my ground, I may lawfully remove them (*o*); and if his cattle or sheep come upon my land, I may chase them and drive them out. When the defendant with a little dog chased the plaintiff's sheep out of his grounds, where they were trespassing, and the sheep went into another man's land next adjoining, and the dog pursued them there, and the defendant did his best to recall his dog, but the dog could not be recalled at once, and the plaintiff sued the defendant for chasing and worrying his sheep, it was held that the action was not maintainable, as the defendant had not incited the dog to chase the sheep after they had left his premises, but had done his best to call the dog off (*p*). But the chasing of trespassing beasts with a mastiff dog is unlawful, and if any damage is done to them by such a dog, the plaintiff will be responsible for a trespass (*q*).

If a dangerous animal is let loose by a man who is acquainted with its ferocious disposition, and the animal bites or otherwise violently injures another, an action for a trespass is maintainable against the person who set it free (*r*).

If a dog chases conies in a warren, or deer in a park, or sheep in a fold, he may be killed by the owner of the animals to prevent their destruction (*s*), but not after the chasing is discontinued and the peril has ceased (*t*).

If a chattel has been lost by one man and found by another, the finder

(*l*) Ante, pp. 2, 16–19; post, ch. 8. CONTRIBUTORY NEGLIGENCE.

(*m*) *Webb* v. *Paternoster*, Godb. 282, pl. 401, ante, pp. 16–20. *Farmer* v. *Hunt*, Brownl. 220.

(*n*) *Slater* v. *Swann*, 2 Str. 872.

(*o*) *Cole* v. *Maundy*, Roll. Abr. TRESPASS, 1, pl. 17, p. 566. *Rea* v. *Steward*, 2 M. & W. 426.

(*p*) *Mitten* v. *Faudrye*, Poph. 161, cited 4 Burr. 2094.

(*q*) *King* v. *Rose*, 1 Freem. 347.

(*r*) De Grey, C. J., 3 Wils. 410. *Leame* v. *Bray*, ante, p. 2.

(*s*) *Wadhurst* v. *Damme*, Cro. Jac. 45. *Barrington* v. *Turner*, 3 Lev. 28.

(*t*) *Janson* v. *Brown*, 1 Campb. 41 *Wells* v. *Head*, 4 C. & P. 568.

has an implied license or authority from the owner to take the chattel and keep it for his use (*u*). But though the taking of a chattel may be lawful in the first instance, yet if the party who has taken it abuses it, uses it, or wastes it, he may render himself a trespasser *ab initio*, and disable himself from justifying or excusing the original taking, as well as any of his subsequent dealings with the property (*v*).

Conversion of chattels.—If a man, who has no right to meddle with goods at all, takes them and removes them from one place to another, an action may be maintained against him for a trespass, but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some other person. Thus, where the plaintiff and defendant, who were porters on the custom-house quay, had each small boxes in a hut on the quay, for storing small parcels of goods until they could be put on board ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that the defendant had a right to remove the goods, and so far was in no fault; but as he had not returned them to the place where he found them, there might be ground for an action for a trespass in meddling with them, but that there was no conversion of them, as the defendant had not in anywise disturbed the plaintiff's dominion or ownership over the property (*x*).

It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel. If a gate has been wrongfully erected by the plaintiff, so as to obstruct the defendant's right of way, and the defendant pulls down and carries away the gate and places it on his own land, in a convenient situation for the plaintiff to fetch it away, if he thinks fit so to do, this does not amount to a conversion of the gate (*y*). "Suppose," observes Rolfe, B., "I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action would lie against me for a trespass; but would any man say that this amounted to a conversion of the horse to my own use" (*z*)? "Scratching the panel of a carriage would be an act of trespass, but no conversion of the carriage" (*a*). But any asportation of a chattel for the use of the defendant or some third person is a conversion of it, because it is an act inconsistent with the general

(*u*) *Isack* v. *Clarke*, 1 Roll. Rep. 130.
(*v*) *Oxley* v. *Watts*, 1 T. R. 12. *Attack* v. *Bramwell*, 32 Law J., Q. B. 146. And see post, ch. 11, s. 1.
(*x*) *Bushel* v. *Miller*, 1 Str. 129.
(*y*) *Houghton* v. *Butler*, 4 T. R. 364.
(*z*) *Fouldes* v. *Willoughby*, 8 M. & W. 551.
(*a*) Alderson, B., ib. 549.

right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.

If a man has possession of my chattel and refuses to deliver it up, knowing or having the means of knowing that I am the owner of it, this is an assertion of a right inconsistent with my general dominion over the chattel, and the use which at all times and in all places I am entitled to make of it, and consequently amounts to an act of conversion (*b*). Therefore, if one man who is intrusted with the goods of another puts them into the hands of a third person, contrary to orders, it is a conversion. If a person, without my permission, take my horse to ride, and leave him at an inn, this is a conversion ; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me, and it is different from the case of a misdelivery of goods merely owing to a mistake (*c*). If a vendor who has sold goods on credit resells the goods before the day of payment has arrived, he is guilty of a conversion (*d*). If one man enters the house of another, and takes an inventory of his goods, and gives him notice that they are distrained for rent and will be sold, this is evidence of a conversion (*e*). If one man takes the property of another without his consent, by abuse of the process of the law, this is an act of conversion (*f*). And if a party aids and assists in the sale of goods under a fraudulent and void warrant of attorney, he may render himself responsible for a conversion of the property (*g*).

If a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess. Whether he has sold more than was necessary is a question of fact in each particular case (*h*). If a judgment-debtor, against whom execution is issued, has a qualified interest only as a bailee in goods seized by the sheriff, and the sheriff, having no notice of the qualified interest, sells them absolutely, he is not, it seems, guilty of a conversion by the mere act of selling. It must be shown that he parted with the possession of the goods, and caused them to be used and damaged by the purchaser (*i*). If a landlord distrains and carries away goods, and, after selling enough to satisfy the rent in arrear, returns the surplus to the demised premises from whence they were taken, there is no conversion by the landlord of any part of the property, he having dealt with it no otherwise than he was by law entitled to deal with it (*j*).

(*b*) *Baldwin* v. *Cole*, 6 Mod. 212. *Burroughes* v. *Bayne*, 5 H. & N. 296 ; 29 Law J., Exch. 188.

(*c*) *Syeds* v. *Hay*, 4 T. R. 264. *Tear* v. *Freebody*, 4 C. B., N. S. 263.

(*d*) *Chinnery* v. *Viall*, 28 Law J., Exch. 180 ; 5 H. & N. 293. *Martindale* v. *Smith*, 1 Q. B. 389.

(*e*) *Neilau* v. *Hanny*, 2 Car. & Kirw. 710. *Needham* v. *Rawbone*, 6 Q. B. 771, n.

(*f*) *Grainger* v. *Hill*, 5 Sc. 577 ; 4 Bing. N. C. 221.

(*g*) *Billiter* v. *Young*, 6 Ell. & Bl. 1.

(*h*) *Aldred* v. *Constable*, 6 Q. B. 381.

(*i*) *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 Law J., Exch. 231.

(*j*) *Evans* v. *Wright*, 2 H. & N. 527 ; 27 Law J., Exch. 50.

A mere negligent dealing with goods by a bailee to whom they have been delivered (post, ch. 9), is not a conversion of them. He may be liable to an action for negligence, but not to an action for a conversion, which only lies where some dominion is asserted by the defendant over the chattel, the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is, to a certain extent, guilty of a conversion; but where there is no unlawful taking of possession or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion. If the goods of one man are consigned to another, whether rightfully or wrongfully, the consignee is justified in depositing them in a place of safe custody, and their destruction there without his default cannot make him guilty of a conversion (*k*).

Wrongful destruction of chattels.—Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it. Thus, the taking of wine from a cask, and filling the cask up with water, is a conversion of all the wine (*l*). If a bailee of a cask of wine consumes part of the wine, this, as against the wrong-doer, is a conversion of the whole of the wine; but the wrong-doer cannot himself set it up and rely upon it as a conversion of the whole, so as to enable him in any way to take advantage of his own wrong (*m*). But to constitute a conversion by reason of the destruction of chattels by the defendant, it must be shown that he destroyed them with the intention of taking to himself the property in them, or deriving some benefit from them, or with the intention of depriving the plaintiff of the possession or use of them; for if the defendant, finding property belonging to the plaintiff encumbering his close, destroys it in endeavouring to remove it, without intending needlessly and wantonly to effect its destruction, this is no conversion of the property (*n*).

Fixtures severed from the inheritance so as to become personal chattels, may be made the subject of an action for a conversion, but not whilst they are annexed to the freehold, and form part of the realty (*o*).

Conversion of chattels by purchasers without title.—According to Lord Holt, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them; "and certainly," observes Lord Ellenborough, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect" (*p*)?

(*k*) *Heald* v. *Carey*, 11 C. B. 993.
(*l*) *Richardson* v. *Atkinson*, 1 Str. 577.
(*m*) Patteson, J., *Philpott* v. *Kelley*, 3 Ad. & E. 106.
(*n*) *Simmons* v. *Lillystone*, 8 Exch. 442; 22 Law J., ib. 217.
(*o*) *Colegrave* v. *Dios Santos*, 2 B. & C. 78.
(*p*) *M'Combie* v. *Davies*, 6 East, 540.

When a demand and refusal must be proved, in order to establish a conversion.—When the chattels of the plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them until they have been demanded of him by the owner, or the party entitled to the possession of them, and he has refused to deliver them up. Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or party entitled to the possession of them, should go himself, or send some one with a proper authority, to demand and receive them ; and if the holder of the goods then refuses to deliver them up, or permit them to be removed, there will be evidence of a conversion (*q*); for "whoever," observes Holt, C. J., "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of a conversion (*r*). The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period (*s*).

What is a sufficient demand and refusal.—If, when goods are demanded, the parties in possession of them refuse to deliver them, except upon a condition which they have no right to impose (*t*), such as the giving a receipt in writing for the goods (*u*), that is tantamount to an absolute refusal, and they are guilty of a conversion. If the party in possession of the good says, when the goods are demanded of him, that he shall do nothing but what the law requires, and does not produce or tender the goods, this is evidence of a conversion of them (*v*). But though he at first refuses, if he afterwards, and before a writ is issued against him, goes to the plaintiff and offers to deliver them up to him, the effect of the previous refusal is done away with, and there is then no evidence of a conversion (*x*). If the demand is for the delivery of an article to the plaintiff in some particular state and condition, a refusal to comply with the demand is not necessarily a conversion, as the defendant may not be bound, or may be totally unable, to deliver the article in the state required (*y*).

So, if the demand is too large; if the plaintiff, being entitled to demand five beasts, requires seven, and the defendant refuses to give up seven, such a refusal is no evidence of a conversion of the five which were never demanded (*z*). If the goods are not in the possession and under the control of the defendant, he is not guilty of a conversion in refusing to deliver them. If, therefore, at the time of the demand, they have been

(*q*) *Thorogood* v. *Robinson*, 6 Q. B. 772.
(*r*) *Baldwin* v. *Cole*, 6 Mod. 212.
(*s*) *Wilton* v. *Girdlestone*, 5 B. & Ald. 847.
(*t*) *Davies* v. *Vernon*, 6 Q. B. 450. *Cobbett* v. *Clutton*, 2 C. & P. 471.
(*u*) *Barnett* v. *Crys. Pal. Co.*, 2 F. & F. 443.
(*v*) *Davies* v. *Nicholas*, 7 C. & P. 339.
(*x*) *Hayward* v. *Seaward*, 1 M. & Sc. 459.
(*y*) *Rushworth* v. *Taylor*, 3 Q. B. 700.
(*z*) *Abington* v. *Lipscomb*, 1 Q. B. 780.

distrained or attached under legal process, they are in the custody of the law, it is no longer in the defendant's power to deliver them up, and he cannot be made responsible for a conversion (*a*).

"Authorities are not wanting to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control" (*b*). The ground of the action is a wrongful conversion, and there must be some evidence to show the defendant to be a tort-feasor. Where, therefore, all that appeared was that some wine-warrants, the property of the plaintiff, came to the hands of the defendant in her representative character as administratrix of her deceased husband, and she handed them over to her attorney, and when the plaintiff demanded them, she said they were in her attorney's hands, it was held that this was no evidence of a conversion (*c*).

If there be a demand in words, and also a demand in writing, both being perfect, either of them may be proved as evidence of the conversion (*d*).

Goods not in the possession of the defendant at the time of the demand.—A man cannot be made a bailee (post, ch. 9) of goods against his will, and, therefore, if things come to be left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them (*e*); and if the goods are demanded of him, and he will have nothing whatever to do with the goods, and will not touch or meddle with them in any way, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them (*f*). Where the defendant, on entering into possession of some premises which he had taken on lease, found thereon some timber which had been deposited there by the permission of the previous occupier, and the plaintiff, to whom the timber belonged, demanded it of the defendant, who said, "If you will bring any one to prove it is your property I will give it you, and not else;" it was held that this qualified refusal, taken in connexion with the surrounding circumstances, and the absence of all evidence of any intermeddling with the timber by the defendant, did not amount to evidence of a conversion (*g*).

Goods found.—If a man finds goods and the owner comes and demands them, and the finder says that he will not deliver them to him until he is satisfied that he is the owner of them, and keeps the goods no longer than is reasonably necessary to enable him to make due inquiry, this is no conversion of the property (*h*).

(*a*) *Verrall* v. *Robinson*, 2 C. M. & R. 495. *Pillot* v. *Wilkinson*, 9 Jur. N. S. 523.

(*b*) Wilde, C. J., *Towne* v. *Lewis*, 7 C. B. 611.

(*c*) *Canot* v. *Hughes*, 2 Sc. 663; 2 Bing. N. C. 448.

(*d*) *Smith* v. *Young*, 1 Campb. 439.

(*e*) *Lethbridge* v. *Phillips*, 2 Stark, 544.

(*f*) *Hawkes* v. *Dunn*, 1 Cr. & J. 527.

(*g*) *Green* v. *Dunn*, 3 Campb. 216, n.

(*h*) *Isack* v. *Clarke*, 1 Roll. Rep. 130.

Goods deposited in the hands of public officers and bailees.—Any officer of the customs having the charge or custody of any goods which have come to his hands under the laws relating to the customs, may refuse delivery thereof until proof shall be given to his satisfaction that the freight due upon the goods has been paid (*i*). Where goods, which have been left at sea, are deposited in the hands of an admiral or public officer, to be kept in his custody until salvage has been paid, and he refuses to give them up until it is ascertained whether salvage is due or not, such qualified refusal does not amount to a conversion (*j*). A servant, who has been intrusted with the custody of goods by his master, does not do his duty if he gives them up on the demand of a stranger, without a previous application to his master for instructions. A refusal, therefore, by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable, and justifiable refusal, and no evidence of a conversion (*k*). The servant has a right to say, "I received the goods from my master, and he ought to have an opportunity of admitting or rejecting your title, and of giving his instructions to me in the matter" (post, s. 2); but if, after having had an opportunity of receiving, or having received, the instructions of his master, he sets up, or relies upon, the title of the latter, and gives an absolute and unqualified refusal to deliver up the goods, he will then, if the person demanding the goods is entitled to the possession of them, be guilty of a conversion (*l*).

If the owner of goods has delivered them to a bailee (post, ch. 9) to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*m*). In an action for a conversion of chattels, it was held by Lord Kenyon, that where the demand of the things for which the action is brought is not made by the owner, who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them till that is ascertained; or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*n*). But if he sets up the title of his bailor, and

(*i*) 22 & 23 Vict. c. 37, s. 2.

(*j*) *Clark* v. *Chamberlain*, 2 M. & W. 83. *Kerford* v. *Mondel*, 28 Law J., Exch. 303.

(*k*) *Alexander* v. *Southey*, 5 B. & Ald. 249. *Mires* v. *Solebay*, 2 Mod. 245.

(*l*) *Lee* v. *Robinson*, 25 Law J., C. P. 249.

(*m*) *Lee* v. *Bayes*, 18 C. B. 607; 25 Law J., C. P. 249. *Europ. & Austr. R. M. Co.* v. *R. M. St. P. Co.*, 30 Law J., C. P. 247. *Sheridan* v. *New Quay Co.*, 4 C. B., N. S. 618.

(*n*) *Solomons* v. *Dawes*, 1 Esp. 82.

affirms him to be the owner, or gives an absolute, unqualified refusal to deliver up the chattels, there is, as we have seen, evidence of a conversion (*o*).

Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a party who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property, without doing either the one or the other (*p*).

If a bailor has no title at the time of the bailment, the bailee can have none, for the bailor can give no better title than he has himself. The right to chattels personal, therefore, may be tried in an action against the bailee; but the situation of the bailee, in cases of disputed ownership to goods in his hands, is not one without remedy. He is not bound to ascertain who has the right. He may, as we shall see (post, ch. 9, s. 2), file a bill of interpleader in a court of equity; or if he is sued in the superior courts, or the county palatine courts, he may obtain relief under the statute of 1 & 2 Wm. 4, c. 58 (post, ch. 9, s. 2), which enables defendants sued in those courts to obtain a stay of proceedings in the action until the rights of the adverse claimants are ascertained by a judicial decision in the manner therein provided. If the bailee forbears to adopt one or other of these modes of proceeding, and makes himself a party in the matter by retaining the goods for the bailor, he must stand or fall by the title of the latter (*q*).

Conversion of goods by railway companies.—If goods are brought by mistake, and without right, and delivered at a railway station, the station-master has no right to detain them after demand by the owner, and the tender of any reasonable expenses due upon them. Where, therefore, a station-master said, in answer to a demand of some goods, "The goods were brought to our station by an intermediate line, which has no right to send goods here, and I shall send them back," it was held that the railway company was liable for the conversion of the goods (*r*). But, in order to fix the company, it must be shown that the wrongful act was done by their authority, that is, by some person acting for them within the scope of his authority (*s*).

Conversion of bills and notes.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and if he does so, he is responsible for a conversion of

(*o*) *Pillot* v. *Wilkinson*, 9 Jur. N. S. Exch. 523. *Woodley* v. *Coventry*, ib. 548.

(*p*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*q*) Ld. Tenterden, *Wilson* v. *Anderton*, 1 B. & Ad. 456. *Atkinson* v. *Marshall*, 12 Law J., Exch. 117.

(*r*) *Rooke* v. *Mid. Rail. Co.*, 16 Jur. 1069.

(*s*) *Glover* v. *Lond. & N. W. &c.*, 5 Exch. 66.

the instrument (*t*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatary, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security (*u*); but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money (*x*).

If a party takes a bill or note after it becomes due, or under such circumstances of suspicion as should have prompted inquiry, he takes it with all its infirmities, and with the risk of its having been lost or stolen (*y*).

Conversion of lost or stolen bank-notes or negotiable securities.—If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all further responsibility in respect of it (*z*). If the party to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it (*a*), or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no better title than the person from whom he has received it (*b*), and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bonâ-fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away (*c*). If he has given full value for the instrument, that is in general conclusive evidence of *bona fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way (*d*). The whole burthen of impeaching the title of the holder of the instrument falls upon the plaintiff, who disputes that title (*e*). It is not enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant (*f*). The latter is not bound,

(*t*) *Alsager* v. *Close*, 10 M. & W. 583.
(*u*) *Crauch* v. *White*, 1 Bing. N. C. 414. *Atkins* v. *Owen*, 4 Ad. & E. 819.
(*x*) *Palmer* v. *Jarmain*, 2 M. & W. 282.
(*y*) *Goggerley* v. *Cuthbert*, 2 N. R. 170.
(*z*) *Canot* v. *Hughes*, ante, p. 273.
(*a*) *Burn* v. *Morris*, 2 Cr. & M. 579.
(*b*) *Bailey* v. *Bidwell*, 13 M. & W. 73.
(*c*) *Miller* v. *Race*, 1 Burr. 452; 1 Smith's L. C. 395. *Grant* v. *Vaughan*, 3 Burr. 1524. *Lawson* v. *Weston*, 4 Esp. 57.
(*d*) *Raphael* v. *Bank of England*, 17 C. B. 173.
(*e*) *Worc. Co. Bank* v. *Dorch. & Milf. Bank*, 10 Cush. 489. *Wyer* v. *Dorch. &c. Bank*, 11 Cush. 51.
(*f*) *Miller* v. *Race*, 1 Burr. 452; 1 Smith's L. C. 395.

from proof of those circumstances alone, to account for his possession of the security (*g*). But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and the latter declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument (*h*); and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security (*i*); but gross negligence may be evidence of *mala fides*, though it is not the same thing (*k*).

In the case of stolen notes, if the possession is recent, and the surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony (ante, pp. 26–29). In all cases he should use due diligence to apprise the public of his loss (*l*).

Conversion by one of several partners, joint-tenants, or tenants-in-common of chattels.—The authorities seem to show that one partner or joint-tenant of a chattel cannot maintain an action against his co-tenant for a conversion of the chattel, in consequence of his having taken upon himself to sell the subject-matter of the joint ownership by sale not in market overt, as the sale under such circumstances only transfers to the purchaser the vendor's interest in the chattel, and renders the purchaser co-tenant only with the other part-owners; but if the chattel be destroyed or sold in market overt, so as to transfer the entire property in the chattel to the purchaser, and oust the other part-owners of their proprietary rights, the sale would then amount to a conversion of the property, and the vendor would be answerable in damages to his other co-tenants (*m*).

In Littleton (sec. 323) it is said that, "if two be possessed of chattels personal in common, and one take the whole to himself out of the posses-

(*g*) *King* v. *Milsom*, 2 Campb. 5.

(*h*) *Bailey* v. *Bidwell*, 13 M. & W. 76.

(*i*) Bayley, J., *Backhouse* v. *Harrison*, 5 B. & Ad. 1105. *Raphael* v. *Bank of England*, 17 C. B. 161, overruling *Snow* v. *Leatham*, 2 C. & P. 317. *Snow* v. *Peacock*, 11 Moore, 286; 3 Bing. 406. *Easley* v. *Crockford*, 3 M. & Sc. 701; 10 Bing. 243. And see post, s. 2, *Title to bills and notes.*

(*k*) *Goodman* v. *Harvey*, 4 Ad. & E. 876. *Arbouin* v. *Anderson*, 1 Q. B. 504.

(*l*) *Beckwith* v. *Corrall*, 11 Moore, 337; 3 Bing. 444.

(*m*) Cresswell, J., *Mayhew* v. *Herrick*, 7 C. B. 249. *Barnardiston* v. *Chapman*, cited 4 East, 121.

sion of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, &c., when he can see his time" (*n*). "This section of Littleton," observes Maule, J., "as it seems to me, is to be understood thus — that there may be dispositions of the subject-matter of the tenancy-in-common which will amount to a conversion, if done by a stranger, that are not so if done by a tenant-in-common. But I do not think that it therefore follows that no dealing with the thing by one of two tenants-in-common, which does not amount to a total annihilation of it, can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow that where one tenant-in-common has dealt with the chattel to an extent exceeding his authority, as where he sells it out and out to a purchaser who carries it away, it would militate against a true understanding of the older authorities to hold that the co-tenant may treat that as a conversion" (*o*).

If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion of the property by the pledgor, and does not render him liable to be sued by his co-partner, as he has a right to pledge to the extent of his limited interest, and to create a lien upon the partnership property (*p*). Where one of two partners became bankrupt, and the solvent partner directed the defendants to sell some partnership property in their hands, and the defendants sold it, and received the proceeds of the sale, it was held that the assignees of the bankrupt partner had no right to recover any of the proceeds of the sale from the defendant by action at law, but that they must proceed for an account in the court of bankruptcy or in a court of equity (*q*).

Wherever the act done by the one tenant-in-common operates as a total destruction of the thing held in common, there is then a wrong done to the other tenant-in-common, in respect of which an action is maintainable. "If one of two tenants be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant-in-common shall have an action for a trespass" (*r*), "for there can be no tenancy in common of a thing destroyed" (*s*).

Right of lien. — If a defendant, having a lien upon goods (post, ch. 9), refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action

(*n*) Litt. sec. 323. *Holliday* v. *Camsell*, 1 T. R. 658.
(*o*) *Mayhew* v. *Herrick*, 7 C. B. 229.
(*p*) *Jones* v. *Brown*, 25 Law J., Exch. 345. *Fennings* v. *Ld. Grenville*, 1 Taunt. 248.
(*q*) *Morgan* v. *Marquis*, 9 Exch. 145. *Edwards* v. *Hooper*, 11 M. & W. 363.
(*r*) Co. Litt. 200a, 200b.
(*s*) 14 Vin. Abr. 516, JOINT-TENANTS.

for the conversion of the property (*t*). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (*u*). "Where a person," observes Alderson, B., "has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods, he thereby puts an end to his lien" (*x*).

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l.*, to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for, and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser (*y*). Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an oast-house on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the oast-house, and the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples (*z*).

SECTION II.

OF THE TITLE TO CHATTELS PERSONAL.

Title to things altered by a wrong-doer.—If one man takes away the chattel of another, either by design or accident, and alters it, or improves

(*t*) *Cannee* v. *Spanton*, 8 Sc. N. R. 714; 7 M. & Gr. 903. *Dirks* v. *Richards*, 5 Sc. N. R. 534; 4 M. & Gr. 574. *Weeks* v. *Goode*, 6 C. B., N. S. 367.

(*u*) *Scarfe* v. *Morgan*, 4 M. & W. 281. *Kerford* v. *Mondel*, 28 Law J., Exch. 393.

(*x*) *White* v. *Spettigue*, 13 M. & W. 608.

(*y*) *Gurr* v. *Cuthbert*, 12 Law J., Exch. 309.

(*z*) *Milgate* v. *Kebble*, 3 Sc. N. R. 358; 3 M. & Gr. 100.

it, he has no right to detain it from the owner until his alterations and improvements have been paid for. If a man wrongfully takes away my carriage, and, without any authority from me, sends it to a coach-maker to be repaired or painted, I am entitled to the possession of my carriage without paying for the repairs or painting (*a*).

Where the defendant and the plaintiff, being at play, the plaintiff thrust his money into the defendant's heap, and so intermingled the coins that it became impossible to separate them, it was adjudged that the whole heap belonged to the defendant; and Coke, C. J., said, "The law is, that if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong" (*b*). And this case was put by Anderson: "If a goldsmith be melting of gold in a pot, and as he is melting it I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, but have lost it; and if a man take my garment, and embroider it with silk or gold, or the like, I may take back my garment; but if I take the silk from you, and with this face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to your action for taking of the silk from you" (*c*).

Title to timber severed from the inheritance.—Whenever timber-trees are severed from the freehold, either by the act of God, as by tempest, or by a trespasser and by wrong, the timber belongs to the party who has the first estate of inheritance, whether in fee or in tail; and he may bring an action for the conversion of it, or file a bill against the wrong-doer for an account. If, therefore, tenant-for-life cuts down timber, the timber belongs to the person entitled to the first estate of inheritance (*d*). But if the wrong-doer has himself the first estate of inheritance, the Court of Chancery will not allow him to take advantage of his own wrong, but will direct the value of the timber to be invested and accumulated for the benefit of the remaindermen who may afterwards become entitled to the property (*e*).

Title to chattels by finding.—The finder of a lost article is entitled to the possession of it as against all parties except the real owner, but he must be an "innocent finder," and must not have taken possession of the property feloniously or fraudulently, knowing, or having the means of knowing, the owner of it, and neglecting to deliver it up to him (*f*). Where a chimney-sweeper's boy found a jewel, and carried it to a goldsmith's shop to know what it was worth, and delivered it into the hands

(*a*) *Hiscox* v. *Greenwood*, 4 Esp. 174.
(*b*) *Warde* v. *Eyre*, 2 Bulstr. 323.
(*c*) Anon. Poph. 38.
(*d*) *Bewick* v. *Whitfield*, 3 P. Wms. 268. *Whitfield* v. *Bewit*, 2 P. Wms. 241.
(*e*) *Powlett* v. *Duchess of Bolton*, 3 Ves. 377. *Tullit* v. *Tullit*, Ambl. 370. *Dare* v. *Hopkins*, 2 Cox, 110.
(*f*) *Buckley* v. *Gross*, 32 Law J., Q. B. 129.

of the goldsmith's apprentice, who, under the pretence of weighing it, took out the stone, and offered the boy three-halfpence for it, which the boy refused, and insisted upon having the jewel back, whereupon the apprentice delivered him the socket without the stone, and an action was brought against the master for a conversion of the jewel, it was ruled "that the finder of a chattel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain an action for the conversion of it" (*g*).

Where the plaintiff, on leaving the defendant's shop, picked up a small parcel which was lying on the shop-floor, and showed it to the shopman, and the parcel, on being opened, was found to contain bank-notes, and the plaintiff requested the defendant to keep the notes, and deliver them to the owner, and the defendant advertised for the owner, and after the lapse of three years, no owner appearing to claim them, the plaintiff applied to the defendant for the notes, offering to pay the expenses of the advertisements, and to indemnify the defendant against any claim in respect of the notes, and the defendant refused to deliver them up, it was held that the plaintiff was entitled to recover them, or the value of them, and that the circumstance of the notes being found by the plaintiff inside the defendant's shop, in the defendant's own house, did not give the defendant any right to detain them as against the plaintiff, who found them there (*h*).

Title to wild birds and animals feræ naturæ—Right of the hunter to the game he kills.—So long as animals *feræ naturæ* remain upon a man's land they belong to him, but the moment they leave his land his possessory property is gone; and this is so, even if they be hunted out of his land by a trespasser, and although they be killed by the trespasser on another man's land. The property in wild grouse is not absolute in any one. So long as the wild bird is upon a man's land he has a possessory property in it, but as soon as it flies or goes off his land, his property is gone (*i*). If A starts a hare in the ground of B, and hunts it and kills it there, the property continues all the while in B; but if A starts a hare in the ground of B, and hunts it into the ground of C, and kills it there, the property has been held to be in A, the hunter, although he is liable to actions of trespass to the lands both of B and C (*k*). Where rabbits were snared and killed in Lord Exeter's land by poachers, and were sold by them to a dealer in game, it was held that the rabbits were the property of Lord Exeter, on whose land they were started and killed, and not

(*g*) *Armory* v. *Delamirie*, 1 Str. 505.

(*h*) *Bridges* v. *Hawkesworth*, 21 Law J., Q. B. 75.

(*i*) *Rigg* v. *Lonsdale*, 1 H. & N. 923, affirming *Lonsdale* v. *Rigg*, 11 Exch. 654; 25 Law J., Exch. 81.

(*k*) Ld. Holt, *Sutton* v. *Moody*, 1 Ld. Raym. 250. *Churchward* v. *Studdy*, 14 East, 249.

the property of the dealer in game (*l*). And where rabbits are bred in a warren, the owner of the warren has a right of property in the rabbits so long as they remain on his land, but as soon as they leave his land his right of property in them is gone (*m*).

Where the Bishop of London granted to the defendant a lease of land for a term of years, excepting the trees, and the herons and shovellers making their nests in the trees, and the defendant, during the lease, took some of the herons, and the bishop brought an action of trespass against him, it was held that he was entitled to recover the value of the herons; for although they were *feræ naturæ*, he had an interest in them, by reason of the trees in which they built (*n*).

Title of the fisherman to the fish he harpoons or nets.—If a whale has been struck by a harpooner, the whale, so long as the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, is a fast fish, though during that time it is struck by a harpooner of another ship; and if the whale afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it (*o*). But although the harpoon comes out of the fish, or is detached from the line, yet if the whale is so entangled in the rope as to give the first strikers the same power over it as if the harpoon was fixed, the fish will still continue a fast fish, and be the property of the first strikers (*p*); and if the fish is unlawfully liberated by the wrongful interference of a third party, who afterwards harpoons it and secures it, it will, nevertheless, be the property of the first strikers (*q*). But if the interference of such third party takes place before the fisherman has got the fish into his power, or under his dominion and control, there can be no right of property in, or title to, the fish (*r*). Thus, where the plaintiff, whilst fishing for pilchards, had nearly encompassed a vast quantity of fish with a net, and would have captured the whole of them but for the interference of the defendant, who came with boats and sailors, and drove the fish into his own nets and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his dominion and control, but ought to have

(*l*) *Blades* v. *Higgs*, 12 C. B., N. S. 501; 31 Law J., C. P. 151; 32 ib. 182.

(*m*) Bro. Abr. Property, pl. 4. *Hadesden* v. *Gryssel*, ante, p. 89.

(*n*) *Bishop of London's* case, 14 Hen. 8, f. 1.

(*o*) *Littledale* v. *Scaith*, 1 Taunt. 243, note (a). *Aberdeen Arc. Co.* v. *Sutter*, 6 Law T. R., N. S. 229; 10 W. R. 516, H. L.

(*p*) *Hogarth* v. *Jackson*, 1 M. & M. 58.

(*q*) *Skinner* v. *Chapman*, 1 M. & M. 59, n.

(*r*) Erle, J., *Stevens* v. *Jeacocke*, 11 Q. B. 741.

sued the defendant for interfering with his nets, and unjustifiably preventing the plaintiff from exercising his occupation and calling of a fisherman, and catching the fish (*s*).

Title to chattels by gift.—If a verbal gift has been made of a piece of plate, or other valuable chattel, to a person to whom it has been delivered to be kept, the verbal gift, unaccompanied by any transfer of possession, cannot, it has been held, transfer any property in the chattel to the donee. There must be either an actual manual delivery, if the chattel is capable of manual occupation and delivery, or a constructive delivery, if the article is bulky and incapable of manual transfer; or there must be a deed of gift under seal, in order to clothe the donee with the ownership and right of possession of the chattel (*t*).

Title to clothes by hiring and service.—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a-year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year (*u*).

Of the right to the possession of grants of arms, title-deeds, leases, bonds, and securities.—A deed of grant of arms from the herald's college is a sort of family document in which every member of the family whose claim to arms is dependent upon it, has an interest. Whatever member of the family, therefore, has got possession of it is entitled to keep it, but may be called on to produce it (*v*). But if the grant is taken out at the joint expense of three members of a family, the deed belongs to the survivor. The owner of a freehold estate has, in general, a right to the title-deeds—the right to the deeds following the right to the land. Where, therefore, a mortgagor conveyed a freehold estate by way of mortgage to the plaintiff, and handed over to the plaintiff forged and counterfeit title-deeds, and then took the genuine deeds to a banker and obtained a loan of money, by depositing the deeds with the banker as security for the loan, and the plaintiff brought an action against the banker for the deeds, it was held that he was entitled to recover them (*x*). Tenant-for-life has a right to the title-deeds of the estate, and may maintain an action against a remainderman who has them in his possession and refuses to give them up (*y*). A lessee, to whom a lease has been delivered, has a right to the possession of the lease, both during the term and after its expiratien, so that the

(*s*) *Young* v. *Hichens*, 6 Q. B. 606. The value of the fish diverted from one net to the other was 568*l*.

(*t*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551. *Shower* v. *Pilck*, 4 Exch. 478; 19 Law J., Exch. 113.

(*u*) *Crocker* v. *Molyneux*, 3 C. & P. 470.

(*v*) *Stubs* v. *Stubs*, 1 H. & C. 257; 31 Law J., Exch. 510.

(*x*) *Newton* v. *Beck*, 3 H. & N. 220; 27 Law J., Exch. 272.

(*y*) *Allwood* v. *Heywood*, 32 Law J., C. P. 153.

lessor has no right to claim possession of it from the lessee (*z*). The obligee of a bond also, to whom the bond has been delivered, is not bound to deliver it up to the obligee on being tendered the amount due upon it. The obligor is entitled to an acquittance or an acknowledgment of the receipt of the money due upon the bond, but not to the possession of the instrument itself (*a*). Neither is the payee of a note not negotiable bound to deliver up possession of the note to the maker on receiving the amount due upon it (*b*).

Right to the possession of documents and securities for money as between trustee and cestui que trust.—The party entitled to the beneficial interest in a contract or security for money is, in general, entitled to the custody of the document or writing by which the beneficial interest or money is secured. If, therefore, the defendant has obtained possession of a policy of insurance to which the plaintiff is equitably entitled, he is responsible for a conversion of the property if he fails to restore it after demand, as the party entitled to the equitable interest in the document is legally entitled to the custody of it (*c*).

The right of property in letters is in the receiver, or person to whom they are addressed and delivered, so far as regards the paper on which they are written. If, therefore, they get back into the hands of the writer, the receiver is entitled to have them returned to him; but he has no right to publish them without leave from the writer (*d*).

Title to chattels by purchase in market overt.—At common law the right of property in things sold is changed permanently by a sale in market overt, so that whoever buys goods and chattels in the open, public, legally constituted market, acquires an indefeasible title to the chattels so purchased, unless he buys with knowledge of an infirmity of title on the part of his vendor. But in order to put a check upon the transfer of stolen property, and induce parties who have been robbed to do their duty to society by prosecuting and convicting the thief, it is enacted by the statute 24 & 25 Vict: c. 96, s. 100, that if any person guilty of any such felony or misdemeanour as is mentioned in the act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence on behalf of the owner, his executor, &c., and convicted thereof, the property shall be restored to the owner, or his representative; and the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award restitution thereof. The order of restitution is in no wise necessary

(*z*) *Hall* v. *Ball*, 3 M. & Gr. 242.
(*a*) Littledale, J., 10 Ad. & E. 618.
(*b*) *Wain* v. *Bailey*, ib. 616.
(*c*) *Oliver* v. *Oliver*, 11 C. B., N. S. 139; 31 Law J., C. P. 4.
(*d*) *Watson* v. *Maclean*, Ell. Bl. & Ell. 77.

to revest the right of property in the party robbed, and enable him to follow goods sold in market overt (*e*).

During the interval between the commission of the felony and the conviction the purchaser has a *primâ facie* title, liable to be defeated by the conviction (*f*); and persons who purchase during that period, and have the good fortune to sell again before the conviction, cannot be subjected to an action for taking or converting the stolen property. Thus, where the plaintiff, who had been robbed of some sheep, and was prosecuting the thief, gave notice of the robbery to the defendant, who had purchased the sheep in market overt, not knowing them to have been stolen, and required the defendant to deliver up the sheep to him, which the defendant refused to do, and sold the sheep again before the conviction of the felon, it was held that the defendant was not responsible for a conversion. "The plaintiff," observes Buller, J., "could not demand the sheep of the defendant, merely because they had been stolen from him, for it was not then certain that the felony would be followed by a conviction of the offender." The plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. But here the plaintiff's property did not revest in him till after the conviction of the felon; and from the time of the conviction the defendant has never had possession of the sheep (*g*).

Title to chattels by private sale and transfer.—A person who buys goods by private contract, and not by public sale in market overt, acquires no better title than that possessed by his immediate vendor. If he purchases at a sheriff's sale or a pawnbroker's auction property which the sheriff or the pawnbroker had no right to sell, he acquires no title as against the true owner of such property (*h*). Whenever, therefore, a purchaser buys of the servant or agent of the owner out of market overt, he takes the risk of the servant's having sold without authority; and if the servant had no authority to sell, and the purchaser refuses to give up the subject-matter of the sale on demand to the master, he is guilty of a conversion (*i*); but where the owner of goods has intrusted another with the possession of goods in order that he may sell them, and the party so intrusted sells contrary to the secret instruction of the owner, the purchaser will nevertheless acquire a perfect and complete title by the sale (*j*).

A purchase of stolen property out of market overt does not convey

(*e*) *Scattergood* v. *Silvester*, 15 Q. B. 511; 19 Law J., Q. B. 447.

(*f*) *Peer* v. *Humphrey*, 2 Ad. & E. 495.

(*g*) *Horwood* v. *Smith*, 2 T. R. 750. *Gimson* v. *Woodfall*, 2 C. & P. 41.

(*h*) *Farrant* v. ——, 3 Stark, 130. *Chapman* v. *Speller*, 14 Q. B. 621; 19 Law J., Q. B. 239. *Morley* v. *Attenborough*, 3 Exch. 500.

(*i*) *Metcalfe* v. *Lumsden*, 1 C. & K. 309.

(*j*) Addison on Contracts, 5th edn. p. 166.

any right of property in the thing sold to the purchaser, although he may have purchased *bonâ fide* for a valuable consideration, and without notice of the felony. A person, therefore, who has been robbed may follow the stolen property, and is entitled to recover it from *bonâ-fide* purchasers who have not bought it in the open public market, although the thief has not been convicted of the felony. In like manner, if the property has been pledged with a pawnbroker, or any other person, he may sue the pawnbroker, or other pledgee, for detaining or converting the property, although he has not prosecuted the thief, nor taken any steps to put the criminal law in motion (*k*). But if the pawnbroker or pledgee received the goods knowing them to have been stolen, the owner of the property cannot then maintain an action against the latter until he has prosecuted for the felony.

Whenever by a contract of sale, made either by the plaintiff in person, or through the medium of his agent, both the right of property and the right of possession of the thing sold have passed to the plaintiff, he is entitled to maintain an action for the unlawful taking, detaining, or converting of the thing which has thus become his own property. Where the plaintiff commissioned her brother to buy a cow for her when he should meet one which he thought would suit her, and the brother bought a cow, and as it was being driven home, and before the plaintiff knew of or had assented to the purchase, the cow was seized by a creditor of the brother, it was held that the plaintiff was entitled to maintain an action of trespass for the seizure of the cow, it being her property (*l*).

When specific ascertained chattels have been sold at a fixed price, the seller is bound to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to the possession of the chattels until he pays or tenders the price, unless the goods are sold upon credit (*m*). Where a debtor shipped goods on board a vessel at Newcastle, to be delivered to his creditor, the plaintiff, in London, and forwarded to the latter a receipt, signed by the mate, acknowledging the receipt of the goods on board, to be delivered to the plaintiff, it was held that the property and right of possession in the goods vested in the plaintiff so as to entitle him to maintain an action against a defendant for the non-delivery of the goods (*n*).

Colourable transfers.—If a transfer of property has been actually effected either by a deed of transfer or by actual delivery, it is not competent to either of the parties to the transfer to set up or show that it was done for the purpose of effecting a fraud on third persons. Acts done

(*k*) *White* v. *Spettigue*, 13 M. & W. 603. *Lee* v. *Bayes*, 18 C. B., 599.
(*l*) *Thomas* v. *Philips*, 7 C. & P. 573. *Payne* v. *Brander*, 2 Stark. 568.
(*m*) *Bloxam* v. *Sanders*, 4 B. & C. 948.
(*n*) *Evans* v. *Nichol*, 4 Sc. N. R. 53; 3 M. & Gr. 614.

may be valid as between the parties, though void as to others. Thus, an assignment made for the purpose of defeating one of several creditors is a good deed as between the parties, but void as against creditors; but if there has been no actual transfer of the property, but only a deposit of chattels in the hands of a bailee, for the purpose of defeating a creditor, the depositary cannot set up the fraudulent character of the deposit in order to deprive the plaintiff of goods which are his property, and to which the depositary has no semblance of title (*o*).

Title of innocent purchasers from fraudulent vendors.—A contract for the sale of goods, though obtained by fraud, is perfectly good, if the party defrauded thinks fit to rely upon it and enforce it; but the latter may, if he pleases, as soon as he discovers the fraud, and before the rights of innocent third parties have intervened, disaffirm and annul the contract, and treat the party who has been guilty of the fraud as a tort-feasor. If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the part of the purchaser, he cannot, after the goods have been resold, and passed into the hands of a *bonâ-fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property; for where one of two innocent parties must suffer, it is considered to be more just that the burthen should fall upon the vendor who parted with the possession of his goods, who trusted to a lie, and was the victim of his own credulity, rather than upon the *bonâ-fide* sub-purchaser, who trusted to the actual possession of the goods by the party with whom he dealt. If this were not so, observes Jervis, C. J., "goods at all tainted by fraud might be followed through any number of *bonâ-fide* purchasers—a most inconvenient and absurd doctrine; for a vendor who does not choose to avail himself of means of inquiry would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world" (*p*).

But if the relation of vendor and vendee does not subsist between the defendant and the person who commits the fraud, and the goods have been obtained by false pretences, and afterwards disposed of to a *bonâ-fide* purchaser by sale not in market overt, the latter does not acquire a title to the goods as against the person who has been defrauded (*q*). Where, therefore, the plaintiffs had sold a quantity of tartaric acid, to be delivered to the order of their purchaser, and one Anderson came to the plaintiffs and represented himself to be a sub-purchaser of the acid, and upon the strength of such representation obtained a delivery-order from the plaintiffs, and got possession of the acid and pledged it with the defendants, it was held that the defendants could make no title to the

(*o*) *Bowes* v. *Foster*, 2 H. & N. 779; 27 Law J., Exch. 262.
(*p*) *White* v. *Garden*, 10 C. B. 927. *Sheppard* v. *Shoolbred*, Car. & M. 63.
(*q*) *Higgons* v. *Burton*, 26 Law J., Exch. 342.

acid through Anderson, who had obtained the transfer of the acid to himself without authority and by false pretences, and that mere possession of chattels, with no further indicia of title than a delivery-order, is not sufficient to entitle a *bonâ-fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action for a conversion of the property (*r*).

Transfers of chattels in the hands of bailees.—If the owner of a chattel or a negotiable security places it in the hands of A, with directions to hand it over to B for B's use, that does not have the effect of transferring the property to B. The direction remains countermandable by the remitter until it is executed either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former (*s*). "The transaction amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it" (*t*). But as soon as the party holding the chattel enters into a binding engagement with the third person to hold it for him, he cannot afterwards contest the title of the latter (*u*). If the defendant has led the plaintiff to believe that he would act as a warehouseman or bailee of the goods for the plaintiff, and after that parts with them to another, he will be guilty of a conversion (*x*).

Title by delivery-order.—The mere possession of a dock-warrant, delivery-order, or warehouse-keeper's or wharfinger's receipt for goods, or any other documentary evidence of title to chattels, is no stronger evidence of title and ownership than the actual possession of the goods themselves. And if by means of a delivery-order fraudulently obtained, and presented to a warehouse-keeper, merchandise has been transferred in the warehouse-keeper's books of transfer into the name of the wrong-doer, the latter cannot thereby convey a valid title by sale or by pledge (*y*).

Title by purchase from the sheriff.—The ordinary course in cases of seizure of goods by a sheriff under a *fi. fa.*, is for the sheriff to sell by auction or by bill of sale; but the law does not require the sale to be made in any particular manner. If the sheriff has the goods valued, and then delivers them by way of sale to the execution creditor for the amount

(*r*) *Kingsford* v. *Merry*, 1 H. & N. 503.
(*s*) *Brind* v. *Hampshire*, 1 M. & W. 373. *Williams* v. *Everett*, 14 East, 596.
(*t*) *Scott* v. *Porcher*, 3 Mer. 663.
(*u*) *Stonard* v. *Dunkin*, 2 Campb. 344.
(*x*) *Hawkes* v. *Dunn*, 1 Cr. & J. 527.
(*y*) *Boyson* v. *Coles*, 6 M. & S. 14. *Kingsford* v. *Merry*, 1 H. & N. 503. *Godts* v. *Rose*, 25 Law J., C. P. 61. Addison on Contracts, ch. 6, 5th edn.

of the valuation, this is a good sale of the property to him (*z*). In ordinary cases of sales by sheriffs, there is no implied warranty of title on the part of the sheriff to the property he sells (*a*). In an interpleader suit between a claimant under a bill of sale from the sheriff and an execution creditor, proof of the bill of sale, with some evidence of a previous seizure of the chattels by the sheriff, is sufficient *primâ facie* evidence of the title of the claimant (*b*).

Title to bills and notes.—Bank-notes are treated as money or cash in the ordinary course of business by the common consent of mankind. If, therefore, a man finds a bank-note, and pays it away *bonâ fide* in the ordinary course of business, the owner has no remedy for the recovery of the lost property; but if he demands the note whilst it still remains in the hands of the finder, the latter will, as we have seen, be responsible for the non-delivery of it (*c*). In the case of the loss of a bill or note by theft or accident, if the bill or note be assignable by mere delivery, the thief or finder may confer a title by transferring it to a person who takes it *bonâ fide*, and who gives value for it without notice of any infirmity of title to the security at the time he receives it. But if the instrument is assignable only by indorsement, neither the thief nor the finder can make a valid indorsement (*d*). And whenever a person discounts, or receives into his possession by way of deposit, a bill, or note, or negotiable security, knowing that the person from whom he receives it is not the owner of it, he cannot lawfully detain it from the true owner (*e*).

When a bill or note has been proved to have been stolen or lost, or to have been obtained by fraud, this affords a presumption that the thief or the finder, or the fraudulent possessor, of the security would dispose of it, and would place it in the hands of another person to sue upon it; and such proof on the part of the defendant casts upon the plaintiff the burthen of showing that he gave value for the note (*f*). Negligence on the part of a person taking a negotiable security, and giving value for it, does not fix him with the defective title of the party passing it to him (ante, p. 277). If, therefore, a cheque payable to bearer is lost, and is tendered a few days after the loss to a shopkeeper in payment of goods purchased, and the shopkeeper takes it without any inquiry, and without any knowledge of the name or address of the party tendering the cheque, he will, nevertheless, be entitled to recover the amount from the maker, unless the

(*z*) *Hernaman* v. *Bowker*, 11 Exch. 760.

(*a*) *Morley* v. *Attenborough*, ante, p. 285.

(*b*) *Hornidge* v. *Cooper*, 27 Law J., Exch. 314.

(*c*) *Miller* v. *Race*, *Grant* v. *Vaughan*, ante, p. 276.

(*d*) *Johnson* v. *Windle*, 3 Sc. 608; 3 Bing. N. S. 225. *Whistler* v. *Forster*, 32 Law J., C. P. 161. Bayley on Bills, 4th ed. p. 107.

(*e*) *Lovell* v. *Martin*, 4 Taunt. 799. *Burn* v. *Morris*, 2 Cr. & M. 579.

(*f*) *Bailey* v. *Bidwell*, ante, p. 276.

latter can prove that the shopkeeper knew that the cheque was a lost cheque at the time he took it (*g*).

Title of assignees of the chattels of bankrupts.—By the Bankrupt Acts (12 & 13 Vict. c. 106, & 24 & 25 Vict. c. 134, s. 117), all the real estate (except copyhold), and all the personal estate and effects of a person who has been adjudged bankrupt, are vested in the assignees, by virtue of their appointment; but where any conveyance or assignment of property is required to be registered, the certificate of the appointment of the assignees must be registered (*h*). Under the old bankrupt law, the title of the assignees to the chattels of the bankrupt had relation back to the act of bankruptcy, so that the chattels ceased to be his, and became the property of his assignees from the time of the commission of the act of bankruptcy, provided the petitioning creditor's debt then existed. But the very harsh effect of this doctrine has been beneficially modified by s. 133 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), which enacts that all conveyances, contracts, dealings, and transactions, by and with any bankrupt *bonâ fide* made before the date of the fiat or filing the petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt, provided the person dealing with the bankrupt had not at the time thereof notice of any prior act of bankruptcy (*i*). As against persons, therefore, having notice of the act of bankruptcy, and not being, consequently, within the protection of this clause, the title of the assignees will have relation back to the time of the act of bankruptcy (*k*), unless the adjudication of bankruptcy is obtained on the petition of the bankrupt himself, in which case there is no relation back to any act of bankruptcy prior to the adjudication (*l*), or unless the trader is adjudged bankrupt under s. 223 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106) without the filing of a petition by the creditor, in which case, also, the bankruptcy has no relation back to any act done by the bankrupt prior to the adjudication (*m*).

Title to chattels purchased from a bankrupt after an act of bankruptcy.—If a man buys goods of a bankrupt, and pays over the price to the latter with knowledge of the act of bankruptcy, he will have no title to the goods as against the assignees; but if he had no notice of the act of bankruptcy at the time he paid the money, the transaction will be protected. Assignees of bankrupts do not, by sending in a bill of parcels or

(*g*) Ld. Kenyon, *Lawson* v. *Weston*, 4 Esp. 57. *Raphael* v. *Bank of England*, 17 C. B. 161. "The cases of *Gill* v. *Cubitt*, 3 B. & C. 566, and *Down* v. *Halling*, 4 B. & C. 330, which were considered to have gone far to overrule the case of *Lawson* v. *Weston*, are no longer law; and the opinion of Ld. Kenyon is set up and supported by all the lawyers." Ld. Brougham, *Bank of Bengal* v. *Macleod*, 7 Moore, P. C. C. 35; v. *Fagan*, ib. 72. Willes, J., 17 C. B. 175.

(*h*) 12 & 13 Vict. c. 106, s. 142.

(*i*) *Brewin* v. *Short*, 5 Ell. & Bl. 236.

(*k*) *Fawcett* v. *Fearne*, 6 Q. B. 28.

(*l*) *Stevenson* v. *Newnham*, 13 C. B. 301.

(*m*) *Monk* v. *Sharp*, 2 H. & N. 548; 27 Law J., Exch. 29.

invoice of goods purchased, necessarily ratify a dealing between the bankrupt and a defendant as a sale. It may amount only to a qualified offer on their parts to adopt the transaction as a sale, provided the defendant will pay for the goods, so as to leave it open to them to maintain an action for the conversion of the property if the defendant will not pay the money demanded (*n*). But if the assignees unreservedly adopt the transaction as a valid contract of sale, they cannot afterwards treat a refusal to re-deliver the goods as a conversion (*o*). No purchase from any bankrupt *bonâ fide* made when the purchaser had notice of the bankruptcy, can be impeached by reason thereof, unless a fiat or petition for adjudication has been issued or filed within twelve months after such act of bankruptcy (*p*).

Transfers of property by bankrupts constituting an act of bankruptcy.— If there be a voluntary conveyance of property by a man who is indebted at the time, which conveyance would have the effect of delaying or defeating the payment of creditors, such conveyance is stamped with the character of fraud. Every conveyance for an antecedent debt is a voluntary conveyance, and when it is made to the prejudice of other creditors, it becomes a fraudulent conveyance, and then the acts relating to bankruptcy come in, and declare that if a man makes a fraudulent conveyance of the whole, or any part of his property, he commits an act of bankruptcy. Again, if a man hands over property for payment of his creditors, except under pressure, he makes a voluntary preference, and that is an act of bankruptcy (*q*).

Title of assignees to property transferred by bankrupts without consideration.— By s. 126 of the Bankrupt Act, 12 & 13 Vict. c. 106, it is also enacted, that if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him. But power of appeal within twenty-one days is given by s. 12 of the statute (*r*).

Title to chattels of which a bankrupt was reputed or apparent owner at

(*n*) *Valpy* v. *Sanders*, 5 C. B. 893; 17 Law J., C. P. 249.

(*o*) *Edwards* v. *Hooper*, 11 M. & W. 363.

(*p*) *Marshall* v. *Lamb*, 5 Q. B. 126.

(*q*) *Lacon* v. *Liffen*, 32 Law J., Ch. 315. *Wensley, ex parte*, ib. (BANKRUPTCY), 23. Addison on Contracts, 5th ed. pp. 151–160, 273–277.

(*r*) And see 24 & 25 Vict. c. 134.

the time of his bankruptcy.—By 12 & 13 Vict. c. 106, s. 125, it is enacted, that if any bankrupt, at the time he becomes bankrupt, shall, "by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner," the court shall have power to order the same to be sold and disposed of for the benefit of the creditors (*s*); but no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered, is to be invalidated or affected by reason of anything contained in the act. This section of the statute extends to chattels which were in the order and disposition of the bankrupt at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded (*t*). The order of the court for the sale is not final and conclusive against persons who have had no opportunity of being heard against it. "It would be a strange thing, and a monstrous hardship," justly observes Maule, J., "that there should exist a power of depriving a man of his goods without giving him an opportunity of being heard" (*u*). The order must be specific as to the goods to which it is to apply. A mere general order to sell and dispose of all property which the bankrupt may have had in his possession, as reputed owner, or of which he had the disposition, with the consent of the true owner, at the time of the act of bankruptcy, does not satisfy the requirements of the statute. "The object," observes Maule, J., "was to prevent the assignees from taking goods so circumstanced, unless they were in a situation to make it appear, before a competent jurisdiction, that there was a *primâ facie* case for the seizure of the goods. To effectuate the object which the legislature had in view, I think the commissioners ought to have an opportunity (*ex parte*, indeed, as was rightly held by the lords justices) (*x*) to enter into some sort of examination before they authorize the assignees to seize and sell. If the assignees cannot, in the absence of opposition, make out a *primâ facie* case before the commissioner, to justify the taking of the goods, they ought not to be allowed to contest the title of the true owner before a jury" (*y*).

Recovery of possession of the goods by the true owner before notice of the act of bankruptcy.—If, before the fiat, and without notice of an act of bankruptcy, the true owner has actually taken the goods out of the possession, order, and disposition of the bankrupt, his title will of course

(*s*) *Mather* v. *Lay*, 2 Johns. & H. 374.

(*t*) *Stansfeld* v. *Cubitt*, 2 De G. & J. 222.

(*u*) *Graham* v. *Furber*, 14 C. B. 157; 23 Law J., C. P. 10.

(*x*) *Barlow, ex parte*, 2 De G. M. & G. 921.

(*y*) *Quatermaine* v. *Bittleston*, 13 C. B. 160; 22 Law J., C. P. 109. *Freshney* v. *Carrick*, 1 H. & N. 661; 26 Law J., Exch. 129. *Hornsby* v. *Miller*, 28 Law J., Q. B. 99.

prevail over that of the assignees (*z*). If before the fiat, and after the act of bankruptcy, the owner has, *bonâ fide* and without notice of the act of bankruptcy, done anything which before an act of bankruptcy would have been sufficient to determine his permission and consent to the goods remaining in the possession, order, and disposition of the bankrupt, so as that a subsequent act of bankruptcy would not have subjected the goods to be dealt with under the clause respecting reputed ownership, his title will prevail, although he had not, before notice, succeeded in obtaining the actual possession of the goods. If, before the date of the fiat, and before notice of an act of bankruptcy, he has *bonâ fide* demanded the goods, and, communicating with the bankrupt, has done that which shows that the goods did not longer, with his consent and permission, remain in the possession, order, and disposition of the bankrupt, his title will not be defeated by a prior secret act of bankruptcy. But a mere intention to demand the goods, and to get possession of them, is not a "dealing" or "transaction" within the meaning of the statute (*a*). And if his consent has not been withdrawn, and it appear that, at the time he got back his goods, he was cognizant of an act of bankruptcy having been committed by the bankrupt, the title of the assignees will prevail, and will relate back to the period of the commission of such act of bankruptcy (*b*).

What things are comprehended under "goods and chattels"—These statutes extend only to chattels personal, and do not embrace chattels real, leases, or interest in land, or fixtures and things attached to the freehold. The object of the legislature was to prevent traders from gaining a delusive credit by a false appearance of substance, which may be caused by the possession of personal chattels, as the possession and ownership generally go together, which is not the case with regard to land and fixtures annexed to the realty (*c*). But moveable machinery in buildings, and all kinds of personal property, whether in possession or action, come within the description of "goods and chattels," such as bonds, bills of exchange and promissory notes, policies of insurance, shares in newspapers, and in public companies whose shares are made personal estate, stock in the public funds, patents for inventions, and charter parties (*d*).

What possession is within the statutes.— The possession of the goods and chattels by the bankrupt must be a possession as reputed owner, with the consent of the real owner. A mere temporary custody, or the

(*z*) *Graham* v. *Furber*, 14 C. B. 134.

(*a*) *Brewin* v. *Short*, 5 Ell. & Bl. 237. *Young* v. *Hope*, 2 Exch. 109. *Pariente* v. *Pennell*, 2 Mood. & Rob. 578.

(*b*) *Fawcett* v. *Fearne*, 6 Q. B. 28. *Heslop* v. *Baker*, 8 Exch. 423; 20 Law J., Exch. 350.

(*c*) *Horn* v. *Baker*, 9 East, 215. *Barclay, ex parte*, 25 Law J., Bank. 4. *Lloyd*, 3 D. & C. 787. *Wilson*, 4 ib. 143. *Coombs* v. *Beaumont*, 5 B. & Ad. 73. *Hubbard* v. *Bagshaw*, 4 Sim. 338. *Boydell* v. *M'Michael*, 1 C. M. & R. 177.

(*d*) *Hornblower* v. *Proud*, 2 B. & Ald. 327. *Longman* v. *Tripp*, 5 B. & P. 67.

mere possession without reputation of ownership (*e*), or the possession with reputation of ownership, but against the will or without the knowledge of the true owner, will not work a forfeiture of the property to the assignees (*f*). "There has been no case upon this act, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one man to the debts of another without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient), or a *lâches* in letting them remain there so as to get him a false credit" (*g*). Therefore the property of infants in the hands of traders, who deal with it as the reputed owners, cannot lawfully be sold for the benefit of creditors, by reason of the incapacity of infants to give their consent and permission within the intent and meaning of the statute (*h*). But if the real owner be of full age, and capable of acting for himself, it should be made notorious "to the world in which the bankrupt moves," that the latter holds the property adversely, and without the consent and permission of such owner (*i*), or the latter should have done all that can reasonably be expected of him to obtain possession of the property prior to the bankruptcy (*k*). If the goods have been placed in the possession of the bankrupt by a person who was himself only the bailee, the consent of the latter to the bankrupt's possession is not the consent of the true owner (*l*).

Reputation of ownership.— Where the bankrupt or insolvent has once been the actual and visible owner of goods and chattels, and has made over all his right and interest in them to a third party, either absolutely or by way of mortgage, and remains in possession of the things so transferred, the continuance of possession, if not a badge of fraud, raises an irresistible presumption of the continuance of ownership (*m*); so that if the goods are not taken out of the possession of the mortgagor before the mortgagee had notice of an act of bankruptcy (*n*), they may be disposed of for the benefit of the creditors. This is the case when a trader mortgages his furniture, goods and chattels, and stock-in-trade, and the mortgaged property is let to him by the mortgagee to be used for hire, or is allowed to remain in his hands notwithstanding the mortgage, and continues in his possession at the time of the issue of the fiat (*o*); where the tenant of a mill gives his landlord by deed a lien upon the fixtures and

(*e*) *Trismall* v. *Lovegrove*, 6 L. T. R., N. S. 329; 10 W. R. 527.

(*f*) *Richardson, ex parte*, Buck, 488. *Lingham* v. *Biggs*, 1 B. & P. 88. *Oliver* v. *Bartlett*, 1 B. & B. 273.

(*g*) Ld. Hardwicke, *West* v. *Skip*, 1 Ves. sen. 243. Parke, B., *Belcher* v. *Bellamy*, 17 Law J., Exch. 222; 2 Exch. 310.

(*h*) Ld. Eldon, *Viner* v. *Cadell*, 3 Esp. 89.

(*i*) Best, J., 2 B. & C. 398.

(*k*) *Smith* v. *Topping*, 5 B. & Ad. 674.

(*l*) *Fraser* v. *Swansea, &c.*, 1 Ad. & E. 354.

(*m*) *Castle, ex parte*, 3 M. D. & D. 124.

(*n*) *Young* v. *Hope*, 2 Exch. 105.

(*o*) *Ryall* v. *Rowles*, 1 Ves. senr. 360. *Kirkley* v. *Hodgson*, 1 B. & C. 598. *Freshney* v. *Carrick*, 1 H. & N. 661. *Hams, in re*, 10 Ir. Ch. R. 100. *Spackman* v. *Miller*, 12 C. B., N. S. 659; 31 Law J., C. P. 309.

machinery of the mill (*p*); where the goods and chattels of a trader are taken in execution by a creditor, and the latter receives an assignment of them from the sheriff, and allows the goods to remain in the trader's dwelling-house, and to be used by him for hire, down to the time of the issue of the fiat (*q*); where a person becomes a dormant or secret partner of a firm in partnership, and permits the partnership stock, furniture, and effects to be in the possession and under the control of the ostensible partners, who become bankrupt (*r*); where a person, who is forbidden to trade in his own name, ships, and warehouses, and deals with goods in the name of the bankrupt, the latter not being a commission agent for sale, and the course of dealing not being according to the ordinary usage of trade (*s*); where a shareholder in a joint-stock company, or a railway company, deposits the certificates of the shares with the creditor as a security for the repayment of money advanced, undertaking to execute a transfer of the shares when called upon, and the shares continue standing in his name in the books of the company, notwithstanding the assignment or deposit of the certificates, and no notice of the assignment has been given to the company (*t*). But if the company does not permit transfers to be made by shareholders without the production of the certificates of the proprietorship of the shares, and these certificates are not in the possession or under the control of the bankrupt, there will be no reputation of ownership, from the circumstance of the shares continuing to stand in his name (*u*). And if the change of ownership has been made notorious to "the world in which the bankrupt moves," the presumption of ownership from the continuance of possession will be rebutted (*x*). If it is notorious that furniture in the possession of a bankrupt never was his property, but was hired by him with the house in which he resides, there will be no reputation of ownership from his possession of the furniture (*y*).

Goods and furniture belonging to a woman who has passed herself off in the world as the wife of a bankrupt have been held to be in his possession, as reputed owner (*z*). But not goods in the possession of a bankrupt and his wife belonging to the trustees of his wife's marriage

(*p*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322.

(*q*) *Lingham* v. *Biggs*, 1 B. & P. 82. *Bryson* v. *Wylie*, ib. 83, n. (a). *Lingard* v. *Messiter*, 1 B. & C. 312.

(*r*) *Enderby, ex parte*, 2 B. & C. 389. *Hare*, 1 Deac. 16.

(*s*) *Gordon* v. *E. I. Co.*, 7 T. R. 228.

(*t*) *Nutting, ex parte*, 2 M. D. & D. 302. *Vallance*, 2 Deac. 354. *Lanc. Can. Co.*, 1 D. & C. 423. *Boulton, ex parte*, 20 Beav. 178.

(*u*) *Morris* v. *Cannan*, 31 Law J., Ch. 425; 6 L. T. Rep., N. S. 521. *Harrison, ex parte*, 3 Deac. 196. *Masterman*, 2 Mont. & Ayr. 212. *Langmead*, 20 Beav. 25. *Littledale*, 6 De G. M. & G. 714; 24 Law J., Bank. 9. *Boulton*, 1 De G. & J. 179. *Richardson, ex parte*, 3 Deac. 503. Addison on Contracts, 5th ed. 277.

(*x*) *Muller* v. *Moss*, 1 M. & S. 335.

(*y*) *Shaw, in re*, 8 Law T. R., N. S. 336.

(*z*) *Mace* v. *Cammel*, Lofft. 782; Cowp. 232.

settlement (*a*); nor the goods of a son of a bankrupt, who lives in the same house with the bankrupt, although the goods have been used and dealt with by the latter (*b*). Wherever, upon a transfer by a trader before his bankruptcy, any reversionary interest accrues to his assignees, the immediate legal interest in the property transferred vests in them as trustees for the parties entitled in the first instance, and then for the creditors; and suits and actions in respect of the immediate interest must be brought in the names of the assignees (*c*).

Things sold by the bankrupt, and left in his possession—Raw materials of manufacture.—If the bankrupt gets his living by buying and selling goods and chattels, and it is a known custom of trade for the vendor to keep possession after a sale of the things purchased, until the purchaser carts them away, or ships them off to their place of destination, possession under such circumstances will not raise a presumption of ownership; and if, after the sale, the bankrupt removes the articles away from the rest of his stock-in-trade, and puts them away in his cellars, warehouses, or into some private place of deposit, and there sets them apart for the purchaser, and enters the sale in his books, they are no longer, after such appropriation has been made, in the possession, order, or disposition of the bankrupt within the meaning of the statute, "for they are not then in the possession of the bankrupt under such circumstances as to deceive the creditors by the appearance of their forming part of that stock to which they might give credit" (*d*); but if the things are left upon the bankrupt's premises undistinguishable from his stock-in-trade, in order that they might be re-sold for the benefit of the buyer, they will be in the possession of the bankrupt as reputed owner, unless it be shown that the latter acts as a commission agent for the sale of goods, or it is a custom of trade for property to remain on the premises of the trader to be re-sold (*e*). "It is the usage," observes Parke, B., "of clock-makers to have clocks of other persons in their shops, both for repair and for sale, and a man has no right to infer, from finding a clock there, that it is the property of the clock-maker. No inference ought to be drawn either that it is or is not his, and, it being uncertain, there is no reputed ownership" (*f*).

If a ship-builder or manufacturer of steam-engines and machinery contracts for the building and sale of a specific vessel, or steam-engine, or mass of machinery, to be paid for by instalments as the work proceeds, and several instalments of the purchase-money are paid by the purchaser, so that the right of property in the chattel, so far as it has been com-

(*a*) *Simmons* v. *Edwards*, 16 M. & W. 838; 11 Jur. 592.
(*b*) *Davis* v. *Living*, 1 Holt, 275.
(*c*) *Leslie* v. *Guthrie*, 1 Bing. N. C. 710.
(*d*) *Marrable, ex parte*, 1 Gl. & Jam. 402. *Dover*, 2 M. D. & D. 259.
(*e*) *Thackthwaite* v. *Cock*, 3 Taunt. 487. *Shaw* v. *Harvey*, 1 Ad. & E. 920.
(*f*) *Hamilton* v. *Bell*, 10 Exch. 545; 24 Law J., Exch. 46.

pleted, vests in the purchaser, and the builder or manufacturer becomes bankrupt, the unfinished chattel in his hands is not in his possession, order, or disposition, as the reputed owner, for it is the known custom of such trades for the manufacturer to be paid from time to time as the work progresses, and it is in general notorious that the builders and manufacturers of such articles are not themselves the owners of them, and the trade could never be carried on if such payments by purchasers were not protected (*g*). And with regard to property not capable of manual occupation and delivery, such as a ship building on the stocks, a haystack in a meadow, timber in a timber-yard, or oil, wine, or corn in stores and warehouses, the rule is, that if the bankrupt has sold such property *bonâ fide*, and received the purchase-money, and made such a delivery as the subject-matter of the sale is capable of, and placed the property at the disposal of the purchaser prior to the act of bankruptcy, it is not in the bankrupt's possession, order, or disposition within the statute, and does not pass to the assignees (*h*), although it has not been removed from the bankrupt's premises, provided it has remained there after the sale no longer than was reasonably necessary to enable the purchaser to fetch it away (*i*). But the transfer of the right of property must be complete. If the thing sold is in the hands of a third party, or if it is on board a vessel at sea, the bill of lading, delivery-order, or whatever documents of title may be necessary to establish the transfer of the ownership, must have been delivered to the purchaser prior to the issue of the fiat (*k*); and in the case of transfers and assignments of ships, the provisions of the registry acts must be complied with, and actual possession taken of the vessel on the first practicable opportunity.

Goods and chattels which have never been the property of the bankrupt.— Where it is shown that the property in possession of the bankrupt at the time of the fiat never belonged to him at all, and was confided to him only for a temporary and special purpose, slighter circumstances will rebut a presumption of ownership arising from possession than in those cases where the property originally belonged to him, and has been subsequently sold and mortgaged without any change of possession (*l*). If goods and chattels have been sent pursuant to order, for the inspection and approval of an intended purchaser, and the latter becomes bankrupt with the goods in his hands before any contract of sale has been made, the goods so sent are not in his possession as reputed owner (*m*). Whenever the possession,

(*g*) *Clarke* v. *Spence*, 4 Ad. & E. 448. *Woods* v. *Russell*, 5 B. & Ald. 942. *Holderness* v. *Rankin*, 2 De G. F. & J. 258. *Watts, ex parte*, 32 Law J. (BANKRUPTCY), 36.

(*h*) *Manton* v. *Moore*, 7 T. R. 71. *Brown* v. *Heathcote*, 1 Atk. 159.

(*i*) *Flyn* v. *Mathews*, 1 Atk. 185. Parke, B., *Belcher* v. *Bellamy*, 17 Law J., Exch. 222.

(*k*) *Belcher* v. *Capper*, 4 M. & Gr. 551. *Lemprière* v. *Pasley*, 2 T. R. 495.

(*l*) *Wiggins, ex parte*, 2 D. & C. 270.

(*m*) *Gibson* v. *Bray*, 8 Taunt. 76; 1 Moore, 519. *Ashton, in re*, 1 Fonb. N. R. 258.

taken in connexion with the custom and usage of trade, and the surrounding circumstances, "is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner" (*n*). Therefore, where there exists a custom which is known, that property standing in the name of a man in the books of a public company may only be his nominally, while the real right to it may be in another person, the reputation of ownership does not attach to the mere nominal possession. This is the case with money in the funds and shares in railway companies standing in the name of a party as trustee (*o*). Where it is the known custom and usage at a particular watering-place for houses to be taken ready furnished as well as unfurnished, and for carriages and horses to be let by the job, day, week, or month, the mere possession of furniture by the tenant of a house, or of a carriage and horses by an inhabitant, will of itself raise no presumption of ownership in the possessor (*p*).

Whenever the custom to hire as well as to buy the plant, machinery, and implements used in the trade which the bankrupt carried on is shown to be so general and notorious in the trade that those who had dealings with the bankrupt, "the world in which he moved might reasonably be provoked to inquire, before giving the bankrupt credit, whether he was the owner of them or not," there is no presumption of ownership from the possession of them. This is the case in the coal-mining trade, where it is the notorious custom of the owners of collieries to demise, not only the colliery, but also the steam-engines, plant, and machinery necessary to get out the coal; in the coal-lighterage trade, where it is the custom for the owners of barges and lighters used to discharge coal to let such lighters out to hire, and to suffer the names of the hirers to be printed upon them; also in the brewing trade, where it is the notorious custom of brewers to hire their vats, barrels, coppers, and brewing utensils; and in the hosiery and lace trade, where it is the notorious custom for stocking-frames and masses of machinery to be let out to hire to the working hosiers, weavers, and mechanics. But the custom must be shown to be general and notorious in the trade, otherwise the presumption of ownership arising from the possession and use of such things will not be rebutted (*q*).

Possession by manufacturers, workmen, and depositaries.—Possession by manufacturers and workmen of goods and chattels, and of raw materials furnished to them by their employers to be manufactured, worked up, or repaired, in the way of their trade, raises no presumption of ownership

(*n*) Abbott, C. J., 3 B. & C. 376; Parke, B., 24 Law J., Exch. 46.
(*o*) *Watkins, ex parte*, 4 D. & C. 87.
(*p*) *Burton* v. *Hughes*, 9 Moore, 334.
(*q*) *Storer* v. *Hunter*, 3 B. & C. 368. *Watson* v. *Peache*, 1 Sc. 140. *Horn* v. *Baker*, 9 East, 239. *Hornsby* v. *Miller*, 1 Ell. & Bl. 192; 28 Law J., Q. B. 99.

within the statute. This has been held to be the case with the timber of the carpenter, delivered to him to be converted into waggons; the cloth of the tailor, sent to him for the purpose of being made into garments; the gold of the goldsmith, sent him to be worked up in the course of his trade; carriages sent to the coach-maker to be repaired, and machinery and chattels manufactured and made to order, and left on the manufacturer's premises after they have been paid for by the employer or purchaser, that they may be altered or repaired, or in order that the purchaser may send for them and convey them away (*r*). Possession by depositaries in the ordinary course of trade, where it is the custom for parties to let out vaults, stores, warehouses, and rooms for the purpose of receiving, storing, and taking care of pictures, furniture, or merchandise, for hire and reward, is not a possession by such depositaries as reputed owners of the goods intrusted to them for safe keeping. Goods and chattels, and contracts, holden by the bankrupt at the time of his bankruptcy as a security for the repayment of money advanced by him to the owners thereof, are not in the reputed ownership of the bankrupt, but the assignees are entitled to all the rights of the bankrupt over them. Goods deposited in the hands of a bankrupt for a specific purpose, or to be applied in a particular way in the ordinary course of trade, and holden by him no longer than is reasonably necessary to carry into effect the trust reposed in him, are not in his reputed ownership; nor bills, notes, and securities for money which have been deposited in the hands of a bankrupt or agent for a special purpose, and which have been set apart by him, and can be identified as the property of the depositor; nor a sum of money in a bag, purse, or box, deposited in the hands of a bailee for a special purpose, and set apart by the latter, and kept distinct from his own monies and effects; but if the money is taken out of the bag or box and used by the bailee, and mixed with his own monies, it will form part of his general estate, and the amount will be a debt due from him to the bailor, which must be proved under the commission (*s*).

Possession, sale, and disposition of chattels by factors and commission agents for sale in the ordinary course of their trade and business is not a possession, sale, &c. by them as reputed owners, although they sell their own goods as well as the goods of other persons, and all are confounded and mixed together, so that it is impossible to tell which goods belong to them and which belong to their customers. Persons selling goods on commission must have the goods of other people in their possession whilst

(*r*) *Collins* v. *Forbes*, 3 T. R. 323. *Carruthers* v. *Payne*, 2 M. & P. 429. *Bartram* v. *Payne*, 3 C. & P. 177. *Wilkins* v. *Bromhead*, 7 Sc. N. R. 921.

(*s*) *Parke* v. *Eliason*, 1 East, 551. *Thompson* v. *Giles*, 2 B. & C. 431. *Sadler* v. *Belcher*, 2 Mood. & Rob. 489. *Zinck* v. *Walker*, 2 W. Bl. 1154. *Jombart* v. *Woollett*, 2 Myl. & Cr. 389. *Sinclair* v. *Wilson*, 25 Law T. R. 58. *Tooke* v. *Hollingworth*, 5 T. R. 227. *Taylor* v. *Plumer*, 3 M. & S. 575.

carrying on their calling, and their possession is known not to be necessarily their own possession as owners. If it is the custom of shopkeepers in certain trades to receive the goods of third parties, and expose them for sale in their shops for a certain hire or commission paid by the owners of such goods, the things so received for sale, and the contracts made concerning them, are not, in case of their bankruptcy, in their possession as reputed owners. Booksellers and publishers, for example, who publish and sell books on commission for the authors and owners thereof, have not the reputed ownership of the books they sell, although the books are mixed with their own books, and are not to be distinguished from their general stock-in-trade (*t*); nor coach-makers, who receive and exhibit in their shops and warehouses coaches for sale (*u*); nor watch and clock-makers, who receive watches to be repaired and sold for their customers (*x*). But if it is not the custom for parties carrying on the trade exercised by the bankrupt to sell goods on commission, or if the whole stock-in-trade of a retail dealer is furnished to him by a wholesale house, and he trades therewith apparently on his own account, such stock-in-trade and goods will be in his possession, order, or disposition as reputed owner (*y*).

The fact of the bankrupt's having been intrusted with the goods as a commission agent for sale, may be proved by oral evidence, although the agreement for the deposit and sale of the goods has been put into writing (*z*). If the goods have been sold by the factor, and not paid for at the time of his bankruptcy, the owner or principal should give notice to the purchaser of the position in which he stands, and require the price to be paid to himself; and if, after such notice has been received, the purchaser pays over the money to the bankrupt factor, or his assignees, the payment will be no answer to an action by the principal for the money. If, after the bankruptcy, the assignees receive the money, it may be recovered from them by the principal (*a*). If the factor has sold the goods and received a cheque on a banker, or a promissory note, or bill of exchange, by way of payment, which is ear-marked and can be identified, or has received money which he has put into a bag, box, or parcel, and set apart for his principal or employer, the cheque, bill, or note so received and the money thus set apart are not in his possession, order, or disposition as reputed owner; but if they have been mixed with the general monies of the bankrupt, they will form part of the bankrupt's estate, to be administered by the assignees, and the principal must then come in as a

(*t*) *Whitfield* v. *Brand*, 16 M. & W. 282.
(*u*) *Carruthers* v. *Payne*, 2 M. & P. 441.
(*x*) *Hamilton* v. *Bell*, 10 Exch. 545.
(*y*) *Livesay* v. *Hood*, 2 Campb. 83. *Shaw* v. *Harvey*, 1 Ad. & E. 920.
(*z*) *Whitfield* v. *Brand*, 16 M. & W. 282.
(*a*) *Pauli, ex parte*, 3 Deac. 169. *Murray*, Cooke's B. L. 379.

creditor upon the estate for the amount as a debt due to him from the bankrupt at the time of his bankruptcy (*b*).

Non-consent of the true owner.—We have already seen that if the owner has demanded back his goods prior to the act of bankruptcy, they are not in the possession of the bankrupt with his consent after the demand has been made. Goods obtained by fraud before the act of bankruptcy, and remaining in the bankrupt's possession at the time he becomes bankrupt, are not in the possession, order, and disposition of the latter with the consent of the owner. If, therefore, the bankrupt has obtained possession of goods through the medium of a fraudulent and pretended purchase, never intending to pay for them, and then becomes bankrupt, with the goods in his possession, they may be reclaimed by the vendor, as there is no true and apparent owner, in such a case, within the meaning of the statute, and no consent and permission by the former, the transaction being a cheat, and fraudulent altogether on the part of the buyer (*c*).

Possession by a bankrupt cestui que trust.—Possession by the bankrupt of furniture belonging to the trustees of his wife's ante-nuptial marriage settlement, is not a possession, by him, with the consent of the true owner, within the meaning of the statute (*d*); nor possession by the bankrupt's wife of cows and stock-in-trade, holden by trustees under a *bonâ-fide* settlement for her separate use, unless the bankrupt has himself traded with the trust property, and got it into his own hands (*e*).

Possession by bankrupt trustees.—Whenever goods and chattels and personal property are held by the bankrupt under the limitations of a will, or a marriage settlement, as a trustee for third parties, the possession of the bankrupt is not a possession with the consent and permission of the true owner within the meaning of the statute. This is the case with respect to possession by trustees of notes and securities held in trust (*f*), also of government stock and shares in the public funds, and joint-stock companies, &c., whether the trust does or does not appear upon the bank books, or the books or register of the company (*g*). Where the trust has not been created by a third party, but by the cestui que trust, or person beneficially interested himself, and the bankrupt has clothed the trustee with the apparent ownership of shares in a public company, by buying them in the name of the latter, and procuring him to be registered as a shareholder, and permitting him to have possession of the scrip certificates,

(*b*) *Dumas, ex parte*, 2 Ves. senr. 585; 1 Atk. 232. *Scott* v. *Surman*, Willes, 400. *Tooke* v. *Hollingworth*, 5 T. R. 227. *Godfrey* v. *Furzo*, 3 P. Wms. 185. *Whitecomb* v. *Jacob*, 1 Salk. 160.

(*c*) *Load* v. *Green*, 15 M. & W. 216.

(*d*) *Simmons* v. *Edwards*, 16 M. & W. 838.

(*e*) *Jarman* v. *Woolloton*, 3 T. R. 618. *Haselinton* v. *Gill*, ib. 620, n (a). *Martin, ex parte*, 19 Ves. 493.

(*f*) *Rogers, ex parte*, 25 Law J., Bank. 41. *Sinclair* v. *Wilson*, 20 Beav. 330; 24 Law J., Ch. 537.

(*g*) *Witham, ex parte*, 1 M. D. & D. 624. *Pinkett* v. *Wright*, 2 Hare, 120.

and attend the meetings of the company, and vote as owner, there may be an apparent ownership with the consent of the true owner, within the mischief of the statute, for a delusive credit may be occasioned by a secret trust of that description (*h*). By 12 & 13 Vict. c. 106, s. 130, it is enacted, that if any bankrupt be possessed, as trustee, of any personal estate, government stock, funds, or annuities, or any of the stock of any public company, it shall be lawful for the Lord Chancellor, on the petition of the person entitled to the produce, dividends, or interest thereof, on due notice given to all persons interested, to order the assignees to assign such property to another trustee, to be holden upon the same trusts, &c. Property of testators and intestates, holden by executors and administrators, in the ordinary course of their administration, is holden by them as trustees, and cannot, consequently, be sold for the benefit of their creditors in case of their bankruptcy (*i*). But if they are allowed to continue in possession of the trust property for several years, and to trade with it, to all appearance, on their own account, by the parties who are entitled to dispute their possession, and call them to account, the property will be deemed to have been in the possession of such executors, &c., as reputed owners, with the consent of the true owners, within the mischief of the statutes (*k*).

A seizure by a sheriff, under an execution against a bankrupt, of the goods and chattels of a third party in the possession, order, and disposition of the bankrupt, with the consent of the true owner, does not in any way withdraw the goods from the possession, order, or disposition of the bankrupt, so as to interfere with the title of the assignees (*l*).

Right of property in things taken and converted after recovery of judgment in an action for the conversion of them.—The recovery of judgment by a plaintiff in an action for the wrongful taking and converting the plaintiff's goods and chattels has the effect of transferring the property of the goods converted from the plaintiff to the defendant. The plaintiff, by recovering damages for the wrong, loses his right of property in the chattel that has been converted, and this transfer of the right of property dates, by relation, back from the time of the conversion. The damages recovered by the plaintiff against the defendant are regarded as the price of the goods, "so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world" (*m*). Having once recovered judgment in respect of the goods, the plaintiff cannot recover again the

(*h*) *Burbridge, ex parte*, 1 Deac. 142. *Ord*, ib. 170.

(*i*) Ld. Mansfield, *Howard* v. *Jemmett*, 3 Burr. 1369. *Ludlow* v. *Browning*, 11 Mod. 139.

(*k*) *Fox* v. *Fisher*, 3 B. & Ald. 136. *Thomas, ex parte*, 3 M. D. & D. 40.

(*l*) *Barrow* v. *Bell*, 5 Ell. & Bl. 540; 25 Law J., Q. B. 3.

(*m*) Per Cur. *Adams* v. *Broughton*, Andr. 19; 6 M. & Gr. 640, n.

same thing against somebody else. His further remedy is altogether gone, and his claim satisfied. By damages recovered is not meant damages *paid* (*n*).

SECTION III.

REMEDIES FOR THE WRONGFUL CONVERSION OF CHATTELS.

If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, the party thus deprived of his goods may bring an action for the trespass, or, waiving the trespass, he may sue for the conversion of the property, or, waiving the tort altogether, he may sue for money had and received (*o*).

Recaption of goods wrongfully seized or stolen.— If A has actual possession of a chattel, and B takes it from him against his will, A may use as much force as is necessary to defend his right and enable him to retake the chattel; and if a chattel has been seized and carried away by a person who has no colour of title to it, and the owner comes and demands it, and the trespasser refuses to give it up, the owner may use force sufficient to enable him to retake his property (*p*). A person, therefore, who has been robbed is entitled to retake the stolen property wherever he can find it, provided the person in possession of it has not acquired a title to it by purchase in market overt, without notice of the robbery. He is not justified in committing an assault, or a breach of the peace, in order to possess himself of the property, unless he finds it in the hands of the thief or the felonious receiver; but he must watch his opportunity for recovering possession, and if he is unable peaceably to retake it, he must pursue his remedy by writ of restitution, or by action. If there has been no alteration of the right of property in the thing stolen, by sale in market overt, he may at once demand it from the person in possession of it; and if the latter refuses to deliver it up to him on demand, he may bring his action; but he cannot, as we have seen, sue the thief himself, or the felonious receiver, until he has done his duty to society by prosecuting the felon (ante, p. 27).

The remedy, by way of action, for the recovery of the stolen property, or for damages for its detention or conversion, is confined, as we have seen, to those persons who had it in their possession at the time of the conviction of the thief or afterwards (ante, p. 285).

(*n*) *Buckland* v. *Johnson*, 15 C. B. 163. *Cooper* v. *Shepherd*, 3 C. B. 271.

(*o*) *Rodgers* v. *Maw*, 15 M. & W. 448. *Neat* v. *Harding*, 6 Exch. 349.

(*p*) *Blades* v. *Higgs*, 10 C. B., N. S. 713; 30 Law J., C. P. 347. *Rex* v. *Milton*, 3 C. & P. 31.

Of the plaintiffs in actions of trespass and conversion.—The person in whom the general property in a personal chattel is vested may maintain an action of trespass for the taking or injuring of the chattel by a stranger (*q*), although he has never had possession in fact, for the general property draws to it the right of possession (*r*). A party entitled to the temporary possession of chattels for a particular purpose may also maintain an action for a trespass, or for the conversion of such chattels against any person who takes possession of them, without having any colour of right so to do (*s*). He may be entitled to sue the owner, if he has a right as against the latter to the temporary possession of the chattel, and the owner refuses to deliver it up on demand (*t*). An auctioneer has a special property as bailee in goods and chattels which are put into his possession for the purpose of sale, whether such goods and chattels be in his own rooms, or in the house of another person; but this is not the case with regard to fixtures. An employment to sell fixtures only authorizes him to sell the right of detaching and removing the fixtures; he has no possession of them as chattels, unless it was intended that he should have possession of them after they were detached. Where, therefore, fixtures sold by an auctioneer were to be detached and removed by the purchaser, it was held that the auctioneer could not maintain an action for their wrongful removal (*u*).

If a timber-tree growing on land demised to a tenant is cut down, the property in the tree is in the lessor, and he may maintain an action against any person who carries it away (*x*); but the lessee has sufficient possession and special property in him to enable him to maintain an action for the conversion of the timber. Property in the hands of very young children is in the constructive possession of the father and master of the house; but watches and books given by a parent to a school-boy or apprentice, and taken away from home, are the property of the boy; and if they are taken away, detained, or converted by a wrong-doer, the boy, and not the parent, is the proper party to sue for the injury (*y*).

If the owner of chattels has, by contract, parted with the possession of them for a certain time, and has only a reversionary interest, he cannot sue a wrong-doer for trespassing upon or converting the property (*z*), unless the bailee, or party clothed with the right of possession, has, by some wrongful act of his own, determined the bailment, or the privity of the bailment has been destroyed by the act of a wrong-doer in taking the goods out of the possession of the bailee, and selling them, or converting

(*q*) *Beaty* v. *Gibbons*, 16 East, 116.
(*r*) Bro. Abr. TRESPASS, pl. 303, 346; Latch. 214.
(*s*) *Burton* v. *Hughes*, 9 Moore, 339. *Sutton* v. *Buck*, 2 Taunt. 307.
(*t*) *Roberts* v. *Wyatt*, ib. 268.
(*u*) *Davis* v. *Dankes*, 3 Exch. 435.
(*x*) *Berry* v. *Heard*, Cro. Car. 242.
(*y*) *Hunter* v. *Westbrook*, 2 C. & P. 578.
(*z*) *Gordon* v. *Harper*, 7 T. R. 13. *Bradley* v. *Copley*, 1 C. B. 698.

them to his own use (*a*). But although the bailor cannot sue for a trespass or for a wrongful conversion of the property, yet he may maintain an action on the case against a wrong-doer, who by negligence or misconduct has caused the goods to be destroyed or permanently injured (*b*).

Every hirer has the use, not the dominion, of chattels demised to him, and therefore, when he alters or changes the nature of the property, or does anything to destroy its identity, his right of using it is at an end, the bailment is determined, and an action is maintainable for the wrongful conversion of the property (*c*). "If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth the cattle, I may well," observes Littleton, "have an action of trespass against him, notwithstanding the lending." "And the reason," saith Coke, "is, that when the bailee, having but a bare use of them, taketh upon him, as owner, to kill them, he loseth the benefit of the use of them" (*d*). If the hirer of chattels sends them to an auctioneer to be sold, this is a conversion of the goods to his own use, which at once determines the bailment, and the owner has an immediate right of possession, and may at once sue for the recovery of the goods, or for damages for the loss of them (*e*).

If goods of the plaintiff have been let to hire to a tenant, and have been distrained for rent whilst in the possession of the latter, and impounded, the plaintiff, nevertheless, retains his right of property in the goods, whilst they continue in the custody of the law, and in case of pound breach against those who take and convert the goods (*f*).

Where the owner of a furnished house puts a party into the possession of the house to manage a business for him, at a certain agreed rate of remuneration, and gives him the use of the furniture, the occupier is the mere servant of the owner, his possession of the furniture is the possession of the master, and the latter is entitled to take it away at any time (*g*). A mere gratuitous bailment of a chattel to another (post, ch. 9) does not remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third party, who takes and converts the chattel, with or without the authority of the bailee. If goods are bailed by A to B, to be kept by the latter, and B bails them to C, who uses and wastes the goods, C is liable to an action at the suit of A for the recovery of

(*a*) See post, ch. 9. *Scott* v. *Newington*, 1 Mood. & Rob. 252.

(*b*) *Mears* v. *Lond. & South-West. Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 221. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 Law J., Exch. 362. *Hall* v. *Pickard*, 3 Campb. 186.

(*c*) *Bryant* v. *Wardell*, 2 Exch. 482. Holroyd, J., *Farrant* v. *Thompson*, 5 B. & Ald. 829. *Fen* v. *Bittleston*, 7 Exch. 159.

(*d*) Co. Litt. 57a–57b.

(*e*) *Loeschman* v. *Machin*, 2 Stark. 312.

(*f*) *Turner* v. *Ford*, 15 M. & W. 215.

(*g*) *Bertie* v. *Beaumont*, 16 East, 36. *Mayhew* v. *Suttle*, *White* v. *Bailey*, ante, p. 228.

compensation for the damage sustained (*h*). If the owner of a chattel gives a gratuitous permission to another to take the chattel and use it, he may, nevertheless, maintain an action against a stranger who takes, damages, or converts the chattel, whilst it is being used by the person to whom it has been lent (*i*).

Joinder of joint-owners as plaintiffs—Joint-tenants and tenants-in-common of chattels.—When several persons are joint-owners of a chattel, they must all be joined as plaintiffs in an action for the conversion of them (ante, pp. 54, 169, 242). Where some engravings had been mortgaged to the plaintiff, and the plaintiff and the mortgagor, after the execution of the mortgage, placed the engravings in the hands of the defendant in their joint names, to be sold by him by a public lottery or raffle, which failed for want of subscribers, and the mortgagor, being greatly in debt, absconded, and the plaintiff then demanded the engravings, but the defendant refused to deliver them to him alone, without an indemnity, it was held by Jervis, C. J., that the refusal was right, and that the plaintiff had no ground of action in respect thereof against the defendant (*k*). But it has been held, that if one tenant-in-common of a personal indivisible chattel bring an action for a conversion against a stranger, if the stranger doth not plead the tenancy in common in abatement, he can have no benefit of it in evidence on the general issue (*l*), and the plaintiff will be entitled to recover damages in proportion to the extent and value of his interest, and the damage he has sustained (*m*).

Parties to be made defendants.—Every person who aids and assists in the act of conversion is responsible for the entire damage that has been sustained, although he acted only as the friend of another wrong-doer, the real principal in the transaction, or is merely a servant obeying his master's orders, and had no idea of committing any wrongful act himself. It is no answer that he acted under authority from another, who had himself no authority in the matter (*n*). Every master and employer is, of course, responsible for a conversion by his servant acting in obedience to his master's orders, or in the execution of his duty to his employer. Thus, if a ship-owner gives orders or directions to his ship-master to detain goods shipped on board, the ship-owner will be responsible for everything done by the master whilst acting in obedience to his orders (*o*). And if a pawnbroker's servant, in the execution of his master's business,

(*h*) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5.

(*i*) *Lotan* v. *Cross*, 2 Campb. 465. *Nicolls* v. *Bastard*, 2 C. M. & R. 659. *Turner* v. *Ford*, 15 M. & W. 212. *Manders* v. *Williams*, 4 Exch. 343.

(*k*) *Burke* v. *Bryant*, C. B. Sittings after Trinity Term, 1852. And see post, ch. 9, s. 2.

(*l*) Ld. King, C. J., *Barnardiston* v. *Chapman*, cited 6 T. R. 770.

(*m*) *Dockwray* v. *Dickenson*, Skin. 640. *Addison* v. *Overend*, 6 T. R. 770.

(*n*) *Parker* v. *Godin*, 2 Str. 813. *Stephens* v. *Elwall*, 4 M. & S. 261.

(*o*) *Schuster* v. *M'Kellar*, 7 El. & Bl. 704; 26 Law J., Q. B. 288.

refuses to deliver up a pawn to the pawnor, on tender of the money due on it, the refusal of the servant is the refusal of the master, and the latter is responsible in damages for a conversion (*p*).

In order to recover against several persons for a joint-conversion, it must be proved that all concurred in some joint act of conversion. If the facts exclude a joint-conversion by all the defendants, but show separate acts of conversion, in which some have participated and others not, some of the defendants may be found guilty and others may be acquitted, for several may be joined as defendants in an action for conversion, and one only may be found guilty (*q*). Where a ship-captain, intending to execute the duties of his employment *bonâ fide*, made a mistake in disposing of the cargo, which amounted to a conversion of it, it was held that there was a joint-conversion by the master and owner (*r*). If a married woman is guilty of a conversion of chattels, she and her husband may be joined as defendants (*s*). Where some sheriff's officers, being authorized to seize the goods of A, by mistake took the goods of the plaintiff, and lodged them in the defendant's stable, and when the plaintiff came and demanded the goods the defendant's wife, in the defendant's absence, refused to give them up, saying, "I am told I shall be borne harmless," it was held that both the husband and wife were responsible for a conversion (*t*).

Of the staying of proceedings on the delivery of the chattels to the plaintiff.—In actions for the conversion of goods and chattels, the defendant may, in certain cases, where no special damage is alleged, or, if alleged, where it is merely colourable, obtain an order for a stay of proceedings on the terms of the delivery of the goods to the plaintiff, and the payment of nominal damages and costs (*u*). In an action for the conversion of a packet of letters, the defendant was allowed to stay proceedings as to one of the letters, upon delivering it up to the plaintiff, and paying costs (*x*). But where there is any uncertainty, either as to the quantity, or quality, or value of the things which have been converted, or when damages have been sustained over and above the value of the goods, the court, or a judge, will not interfere to stay the proceedings upon the delivery of the goods to the plaintiff (*y*).

Declarations for a trespass, or for the conversion of chattels.—Whenever the goods and chattels of one man have been wrongfully taken and carried away by another, the wrong-doer may be sued either for a trespass or for a conversion of the chattels. If the chattels have come lawfully into the possession of the defendant, and there was no trespass in the taking

(*p*) *Jones* v. *Hart*, 2 Salk. 441.
(*q*) *Nicoll* v. *Glennie*, 1 M. & S. 589. Ante, pp. 171, 243.
(*r*) *Ewbank* v. *Nutting*, 7 C. B. 808.
(*s*) *Keyworth* v. *Hill*, 3 B. & Ald. 688.
(*t*) *Catterall* v. *Kenyon*, 3 Q. B. 310.
(*u*) Chitty's Arch. Pr. 1294, 9th ed.
(*x*) *Earle* v. *Holderness*, 4 Bing. 462.
(*y*) *Tucker* v. *Wright*, 11 Moore, 503. *Whitten* v. *Fuller*, 2 W. Bl. 901. *Olivant* v. *Berino*, 1 Wils. 23. *Gibson* v. *Humphrey*, 1 Cr. & M. 544. *Lucas* v. *Lond. Dock Co.*, 4 B. & Ad. 378.

of them, but the defendant fails to deliver them within a reasonable time after they have been demanded by a plaintiff entitled to the possession of them, the declaration should be for a conversion of them. A declaration for a trespass upon personal property alleges, either that the defendant seized and took certain goods and chattels of the plaintiff, and damaged and destroyed them, or deprived the plaintiff of the use of them, or that he shot at and lamed the plaintiff's dog, and greatly injured it, or that the defendant drove his horse and cart against the horse and carriage of the plaintiff, and greatly damaged them, and deprived the plaintiff of the use of them, and obliged him to hire another horse and carriage, &c., as the case may be, claiming damages in each case. A declaration for the wrongful conversion of the plaintiff's chattels by the defendant simply alleges "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," describing them (*z*).

Where a tenant, during his tenancy, whilst removing a dung-heap, dug into and carried away a quantity of virgin-soil beneath the dung-heap, it was held that the soil, so soon as it had been severed from the freehold, vested in the landlord as a chattel, so as to enable him to declare against his tenant for a trespass *de bonis asportatis*, or for a conversion of chattels (*a*).

What may be given in evidence under the plea of not guilty.—In actions for a trespass, or for converting the plaintiff's goods, the plea of not guilty operates as a denial of the defendant's having committed the wrong alleged by taking or converting the goods mentioned, but not of the plaintiff's property therein, and no other defence than such denial is admissible under that plea (*b*). Wherever, therefore, the defendant allows that he meddled with goods which were the property, and in the possession of the plaintiff, he is presumed to be a trespasser, and if he has any matter of justification, or any authority, general or particular, express or implied, from the plaintiff, this must be specially pleaded. Therefore, where an action was brought against the defendant for unmooring the plaintiff's barge, it was held that the defendant could not, under the plea of not guilty, give in evidence facts and circumstances showing that he was justified in so doing; such as that the barge was in the greatest danger of being carried away by floating ice, and that the defendant, being employed generally by the plaintiff to look after his barges, removed the barge from a place of danger to a place of safety (*c*).

The plea of not guilty in actions for the conversion of chattels puts

(*z*) 15 & 16 Vict. c. 76, Sched. B. 28. *Holmes* v. *Hodgson*, 8 Moore, 379.

(*a*) *Higgon* v. *Mortimer*, 6 C. & P. 616; ante, pp. 194, 241, 264.

(*b*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxxi.

(*c*) *Milman* v. *Dolwell*, 2 Campb. 378.

in issue the wrongful character of the act, so that if the defendant detained them in the exercise of a legal right consistent with the fact of the right of property being in the plaintiff, the true character of the detainer and the existence of the right may be given in evidence under the plea of not guilty. The demand and refusal of the goods are not in themselves an actual conversion, but only evidence of it. Any fact, therefore, explanatory of the demand and refusal is receivable in evidence under the plea of not guilty, because it goes directly to show that there was no conversion at all: such as the fact that the defendant has a lien upon the chattel in his hands, or that he and the plaintiff were joint-owners of the chattel, and that what the defendant did was in the exercise of his legal rights as joint-owner with the plaintiff (*d*), or that the defendant had some qualified right in it, and has only dealt with the article in the manner in which he was entitled to deal with it in the exercise of his legal right (*e*). But a defence to the effect that the chattels had been given by the defendant to the plaintiff, subject to a condition not performed, whereupon they again became the property of the defendant, whereupon the latter retook them, and claimed to keep them as his own property, is not admissible under the plea of not guilty (*f*).

Pleas denying the plaintiff's right of property in, or his right to, the possession of the chattel.—If the defendant intends to dispute the plaintiff's title to, or his right to the possession of the chattel taken or converted, he must plead a plea, alleging that the goods and chattels taken or converted were not, at the time of the alleged conversion, the property of the plaintiff, or that the plaintiff was not then entitled to the possession of them. Under this plea the defendant is at liberty to set up any circumstances showing that the plaintiff has no property in, or right of possession of the goods, in respect of which he is entitled to maintain the action against the defendant. A plea, denying that the goods are the goods of the plaintiff, puts in issue the plaintiff's property in, as well as his right to, the possession of the goods (*g*). If the defendant has, by contract, acquired a right to take and carry away the chattel, the contract may be given in evidence under a plea denying that the chattel was at the time of the seizure the chattel of the plaintiff (*h*). Under this plea it is competent to the defendant to show that the plaintiff had parted with the property before the cause of action arose, or that the defendant had a lien upon the goods, as a right of lien on the part of the defendant is inconsistent with a right of possession on the

(*d*) *Higgins* v. *Thomas*, 8 Q. B. 908.

(*e*) *Young* v. *Cooper*, 6 Exch. 259; 20 Law J., Exch. 136; Parke, B., 14 M. & W. 272, overruling *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1. *Wilkinson* v. *Whalley*, 5 M. & Gr. 590. *Verrall* v. *Robinson*, 2 C. M. & R. 495.

(*f*) *Jones* v. *Davies*, 6 Exch. 663; ante, pp. 56, 125.

(*g*) *Harrison* v. *Dixon*, 12 M. & W. 142.

(*h*) *Richards* v. *Symons*, 8 Q. B. 90. *Reeve* v. *Whitmore*, 9 Jur. N. S. 243.

part of the plaintiff (*i*), of that the title to the goods had become vested in assignees under a bankruptcy (*k*), or by virtue of an order made by the Court of Bankruptcy, although the order was applied for, and made after action brought (*l*), or that the plaintiff's title has been defeated by matter subsequent to the bailment (*m*). In an action against assignees of a bankrupt for the conversion of chattels, the defence that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owner, and that the title to the goods vested in the assignees, by virtue of an order made by the Court of Bankruptcy, is admissible under a plea of not possessed, although the order was applied for and made after action brought (*n*).

A plea of the previous recovery of judgment by the plaintiff in an action for the conversion of the property brought against some third party, under whom the defendant claims, is, as we have seen, an answer to the action (*o*).

Pleas of justification.—If the defendant intends to justify the taking of the goods on grounds distinct from any question of title or right of property or possession, he must set forth his ground of justification in a special plea; such as, that the goods and chattels mentioned in the declaration were wrongfully upon the defendant's land, encumbering the same, and doing damage there to the defendant, whereupon the defendant took the goods and carried them to the plaintiff's land, and deposited them there, doing no damage to them that could be reasonably avoided (*p*): or if the plaintiff complains of the shooting of his dog by the defendant, the latter may justify the trespass or conversion of the animal, on the ground that the dog was trespassing on the defendant's land in pursuit of and worrying the plaintiff's sheep, or hunting and chasing the defendant's deer, and that the defendant had no means of protecting his sheep or deer from injury but by shooting the dog, and that he therefore shot it (*q*).

Evidence at the trial — Proof by the plaintiff.—To enable a plaintiff to maintain an action and recover damages for a seizure or conversion of chattels, he must show that the seizure was wrongful, and that he has been damnified by it (*r*). He must, therefore, give some general evidence of his right to the chattel, and of the wrong done to him by the plaintiff

(*i*) *Dorrington* v. *Carter*, 1 Exch. 566. *Lane* v. *Tewson*, 12 Ad. & E. 116, n. *Barton* v. *Brown*, 5 M. & W. 298. *Owen* v. *Knight*, 4 Bing. N. C. 54.

(*k*) *Leake* v. *Loveday*, 5 Sc. N. R. 921; 4 M. & Gr. 972. *Howarth* v. *Tollemache*, ib. 329.

(*l*) *Heslop* v. *Baker*, ante, p. 293.

(*m*) Martin, B., *Thorne* v. *Tilbury*, 3 H. & N. 539; 27 Law J., Exch. 407; post, ch. 21.

(*n*) *Heslop* v. *Baker*, 8 Exch. 411; 22 Law J., Exch. 333. *Isaac* v. *Belcher*, 5 M. & W. 139.

(*o*) *Cooper* v. *Shepherd*, ante, p. 303.

(*p*) *Cole* v. *Maundy*, *Rea* v. *Steward*, 2 M. & W. 426.

(*q*) *Barrington* v. *Turner*, 3 Lev. 28.

(*r*) *Tancred* v. *Allgood*, 4 H. & N. 438; 28 Law J., Exch. 362.

in taking it away; for if there is no proof of his having ever been in possession of the chattel, or of his having any right to the possession of it, there is no proof of any wrong having been done to him, nor any evidence of any cause of action, nor anything to support the material averments of the plaintiff's declaration (*s*). Where the plaintiff proved that the defendant seized some chairs and tables in a house which was not the plaintiff's house, and carried them away, and the only plea on the record was a plea of not guilty, it was held that the plaintiff must, nevertheless, give some general evidence of his right to the possession of the chairs and tables to constitute a cause of action, and establish the tort or wrong charged in the declaration (*t*). If in a declaration for a trespass in entering a house and seizing goods there is no allegation that the goods belonged to the plaintiff, nor any admission to that effect on the record, there is no disclosure of any cause of action (*u*).

Proof of title of assignees of bankrupts, executors, and nominal parties.— In all actions by and against assignees of bankrupts, or executors, or administrators, or persons authorized by statute to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in issue unless it is specially denied (*x*). The Bankrupt Act, 12 & 13 Vict. c. 106, s. 233, amended by 17 & 18 Vict. c. 119, s. 24, makes the London Gazette conclusive evidence of the bankruptcy as against the bankrupt, and against persons whom he might have sued had he not become bankrupt: provided the bankrupt does not dispute the fiat or petition for adjudication within the time therein limited (*y*).

Proof of conversion.— It is necessary for the plaintiff in an action for the conversion of chattels to prove either that the defendant unlawfully meddled with the plaintiff's goods, and removed them from some place where they had been deposited by the plaintiff, and that the goods had been since then lost to the plaintiff, or that the chattels came to the hands of the defendant wrongfully, or by a tortious taking, or that the defendant has unlawfully exercised dominion over them, to the prejudice of the plaintiff, or that there has been a wrongful destruction of the chattels (ante, p. 271). If the property came lawfully into the possession of the defendant, or under his dominion and control, there must then, as we have seen, be proof of a demand and refusal of the property by a party entitled to make the demand, and have possession of the chattels (ante, pp. 272, 273).

(*s*) *Channon* v. *Patch*, 5 B. & C. 897.
(*t*) *Forman* v. *Dawes*, Car. & M. 129.
(*u*) *Pritchard* v. *Long*, 9 M. & W. 666.
(*x*) Reg. Gen. Hil. Term, 1853, 1 Ell. & Bl. lxxix.
(*y*) And see further, as to proof of proceedings in bankruptcy by production of advertisements in newspapers and depositions of deceased witnesses, ss. 240, 242, and records sealed with the seal of the court, post, ch. 21.

The refusal must, as we have seen, be an absolute refusal, and not a qualified conditional refusal, amounting only to an objection to deliver the goods, until the plaintiff's title to them has been ascertained (ante, p. 274). If the plaintiff complains of the conversion of a bank-note or negotiable security, he must show that the defendant got the note under circumstances which give him no title to hold the note as against the plaintiff (ante, pp. 275–277). Any admission on the part of the defendant that the plaintiff's property had come into the defendant's hands, or under his control, and had then been wrongfully dealt with by him, will be evidence of a conversion. Thus, where a defendant, in answer to a demand made upon him by the plaintiff for the delivery of a bill of exchange, said that he could not give it up because it had been burnt, it was held that this was evidence of a conversion by him of the bill (*z*).

Proof of constructive possession of chattels.—If a man cuts down wood or rushes, and stores them on the ground ready to be carried away, the things so severed from the realty are in the actual possession of the party who has cut them down, and proof that the act of severance has been committed by the plaintiff is sufficient *primâ facie* evidence of title to enable the plaintiff to maintain an action against another person for seizing them and carrying them away, and the plaintiff's *primâ facie* title cannot be disputed under the plea of not guilty (*a*). Proof that the plaintiff dug out ore, or sand and gravel, and piled it in heaps on the ground, is *primâ facie* proof that he is entitled to the heaps (*b*). Proof that the plaintiff is the owner of a vessel taking in cargo is *primâ facie* evidence that the plaintiff is the owner of the cargo (*c*). If the plaintiff shows that he has a right to the possession of chattels, this will enable him to maintain an action for damages without proof that he has ever had actual possession of them, or that he is the owner of them ; for a factor to whom goods have been consigned by the owner for sale, and who has never received them, may maintain an action for the conversion of them (*d*). There may be a constructive possession of chattels in respect of the right of property being actually vested in the plaintiff. Such is the case in an action of trespass by the lord for an estray or wreck taken by a stranger before seizure by the lord, where the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession (*e*). If trees growing on land demised to a tenant are cut down by the latter, or fixtures attached to a dwelling-house are severed

(*z*) *M'Kewen* v. *Cotching*, 27 Law J., C. P. 41.

(*a*) *Rackham* v. *Jesup*, 3 Wils. 332.

(*b*) *Northam* v. *Bowden*, 11 Exch. 70; 24 Law J., Exch. 238. *Rowe* v. *Brenton*, 8 B. & C. 737.

(*c*) *Brancker* v. *Molyneux*, 3 M. & Gr. 84.

(*d*) Eyre, C. J., *Fowler* v. *Down*, 1 B. & P. 47.

(*e*) *Smith* v. *Milles*, 1 T. R. 480.

by the tenant, the landlord has an immediate right of possession of the trees and fixtures so severed from the inheritance; they are his goods and chattels, and if they are taken away from the demised premises he may maintain an action for the conversion of them (*f*).

Where there was an absolute assignment of goods by deed, with a covenant to pay a certain debt on demand, and a proviso for redemption on payment of the debt, and a further proviso that the assignor should continue in possession until default, and before any default made the goods were taken in execution and sold by the sheriff, it was held that the assignee had not such a right of immediate possession as would entitle him to maintain an action against the sheriff for a conversion of the goods (*g*).

Evidence for the defence.—The defendant cannot, as we have seen, set up any right or title to the subject-matter of the action in answer to a *primâ facie* case on the part of the plaintiff, unless the right of possession or right of property has been put in issue by the pleadings (ante, pp. 308–310); but he may, as we have seen, under the plea of not guilty, show that he has a lien on the goods, and detain them in the exercise of such right of lien, or that he is joint-owner of the goods with the plaintiff, or has some limited or temporary right or interest in them, and has therefore a right to keep them (ante, pp. 279, 309). When goods have been taken from the actual possession of the plaintiff, and the defendant fails in establishing any title in himself to the property, so as to justify the seizure, he will not be allowed to set up a *jus tertii*, and deny the plaintiff's title to the goods; for, as against a wrong-doer, possession is title, and the presumption of law is that the possession and ownership of chattels go together, and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defence by one who admits that he had no title and was a wrong-doer when he took or converted the goods (*h*). A wrong-doer, therefore, in actual possession of goods, the property of a stranger, can recover their value in an action against another wrong-doer who takes the goods from him (*i*).

When the defendant is estopped from disputing the title of the plaintiff.—If the defendant has by deed admitted the title of the plaintiff to the chattels in respect of which the action is brought, he will be estopped from disputing it at the trial (*k*). If he has accredited the title of some third party to the goods, and so induced the plaintiff to buy from the latter, he will be estopped from setting up any title in himself (*l*). If

(*f*) *Farrant* v. *Thompson*, 5 B. & Ald. 828.

(*g*) *Bradley* v. *Copley*, 1 C. B. 685.

(*h*) *Heath* v. *Milward*, 2 Sc. 160; 2 Bing. N. C. 100. *Carter* v. *Johnson*, 2 Mood. & Rob. 265. *Ashmore* v. *Hardy*, 7 C. & P. 505.

(*i*) *Jeffries* v. *Gt. West. Rail. Co.*, 5 Ell. & Bl. 806; 25 Law J., Q. B. 107.

(*k*) *Wiles* v. *Woodward*, 5 Exch. 557.

(*l*) *Waller* v. *Drakeford*, 1 Ell. & Bl. 753.

the owner of goods parts with the possession of them, and knowingly suffers his bailee to deal with the goods as owner, and culpably and negligently stands by and allows a third party to acquire an interest in the goods on the faith and understanding of a fact which he can contradict, and does not contradict, he will be afterwards estopped from disputing the fact in an action against the person whom he has himself assisted in deceiving. Thus, if A, the owner of goods, stands by and permits B to sell them to C, without giving any notice to C of his being the owner of the goods, he will be estopped from disputing C's title under the sale (*m*).

Where the plaintiff, in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant, and in order that the latter might appear to be the true owner he made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale, it was nevertheless held that the plaintiff, as between himself and the defendant, was not estopped from showing the real character of the transaction, so as to entitle him to recover back the goods from the defendant. Here no deed of transfer had been executed, and the jury found there was no sale and no intention of transferring the right of property in the things to the defendant. "And," observes Martin, B., "it is perfectly true that if an act be done, the party cannot avail himself of his own fraud to undo it; but here the act is not done, as the jury expressly find there was no sale at all to the defendant," and no transfer whatever of the property in these goods to him (*n*).

Evidence under pleas of justification.—If the defendant has placed a plea of justification on the record, all the material averments of the plea should be proved. If the defendant justifies the shooting of a dog, on the ground that the animal was hunting and chasing deer in a park, or conies in a rabbit-warren, sheep in a fold, or fowls in a poultry-yard, he must prove that the dog was in hot pursuit at the time he shot it (*o*). But if a man allows his sheep or his fowls to escape from his own land, and trespass upon his neighbour's property, and they are there attacked and worried by his neighbour's dog, he cannot justify the shooting of the dog in defence of his strayed sheep or fowls.

Dogs trespassing in pursuit of animals *ferœ naturæ* cannot lawfully be destroyed. "A dog," observes Lord Ellenborough, "does not incur the penalty of death for running after a hare in another man's ground. And if there be any precedent of that sort which outrages all reason and common sense, it is of no authority to govern other cases. A game-

(*m*) *Gregg* v. *Wells*, 10 Ad. & E. 98.
(*n*) *Bowes* v. *Forster*, 2 H. & N. 779; 27 Law J., Exch. 262.
(*o*) *Barrington* v. *Turner*, 3 Lev. 28. *Protheroe* v. *Mathews*, 5 C. & P. 586. *Wadhurst* v. *Damme*, Cro. Jac. 45. *Wells* v. *Head*, 4 C. & P. 568. *Janson* v. *Brown*, 1 Campb. 41.

keeper has no right to kill a dog for following game" (*p*), although the owner of the dog has received notice that trespassing dogs will be shot (*q*).

Of the assessment of damages.— Whenever the chattels of one man have been wrongfully seized by another, who has assumed a virtual dominion over them, substantial damages are recoverable, although no pecuniary damage can be proved to have been sustained. Where, therefore, the defendant wrongfully seized the plaintiff's horse and cart, and placed a man to keep possession of it, who allowed the plaintiff the free use of the cart, which was driven to market every day, it was held that the plaintiff was nevertheless entitled to recover substantial damages in respect of the infringement of his proprietary rights (*r*).

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of the damages, where no special damage is claimed, or has been sustained, and the goods have not been tendered and received back after action (*s*). If the chattel is of such a nature that the loss of it may readily be supplied by the purchase of a similar chattel in the market, the damage will be the marketable value of the chattel at the time of the conversion. If the value of it is doubtful, every presumption is made against the wrong-doer. Where a boy having found a jewel set in a socket took it to a jeweller's to know what it was worth, and the jeweller took the jewel out of the socket to examine it, and then refused to deliver it up, and the boy brought an action for the conversion of the jewel, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did" (*t*).

If an action is brought for the shooting of a dog, the character and propensities of the animal for mischief may be considered in mitigation of damages (*u*).

If a jury arrive at the conclusion that a defendant has come dishonestly by a part of property which has been stolen, they are warranted in finding that he got possession of the whole. Thus, where a diamond necklace worth 500*l.* had been stolen, and a portion of the diamonds shortly after the robbery came into the defendant's possession, and the latter gave contradictory and unsatisfactory accounts as to the mode in which he became possessed of them, and the owner sued and recovered

(*p*) *Vere* v. *Ld. Cawdor*, 11 East, 569.
(*q*) *Corner* v. *Champneys*, cited 2 Marsh. 584.
(*r*) *Bayliss* v. *Fisher*, 7 Bing. 153.
(*s*) *Wood* v. *Morewood*, 3 Q. B. 440, n. *Finch* v. *Blount*, 7 C. & P. 478. *Alsager* v. *Close*, 10 M. & W. 584. *Ewbank* v. *Nutting*, 7 C. B. 809.
(*t*) *Armory* v. *Delamirie*, 1 Str. 504.
(*u*) *Wells* v. *Head*, 4 C. & P. 568.

a verdict for the full value of the necklace, it was held that the jury were justified in finding that the whole necklace came into the defendant's hands (*x*).

The plaintiff is entitled, under a declaration properly framed, to recover all that at the commencement of the suit he has lost through the wrongful seizure of his goods, and the defendant cannot, in mitigation of damages, show that after action brought he paid to the defendant the value of the goods (*y*). The jury are not limited in assessing the damages to the price or value of the article on the day of the conversion, but may give the value at any subsequent time at their discretion, as the plaintiff might have had a good opportunity of selling the goods if they had not been detained (*z*). If the defendant, acting *bonâ fide* under the belief that he had acquired the lawful ownership of the chattel, has proceeded to lay out money upon it, and improve it, and increase its value, the plaintiff will not in all cases be entitled to swell the damages by estimating them according to the improved value of the article. "It may be," observes Maule, J., "that the wrong-doer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it, and the owner may bring an action for the detention or conversion of it; but it does not follow that the owner is to recover the full value of the thing in its improved state. The proper measure of damage is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, that is, what it was really worth at the time of the conversion" (*a*). If at the time of the seizure the plaintiff was under an obligation to have the goods sold, then, if they have been fairly sold, the price realized at the sale may be the fair measure of damages, if there has been nothing harsh or oppressive in the defendant's conduct, or that of his agents (*b*); but if at the time of the seizure the plaintiff was under no obligation to part with his goods, but was in a position to retain the dominion and use of them, he is at the very least entitled to be placed in the condition he was in at the time his goods were taken away from him, and to be compensated with such an amount of money as will enable him to replace the goods (*c*). "It is, however," observes Alderson, B., "entirely a question for the jury what damages they will allow. Juries have not much compassion for trespassers, and they are not bound to weigh in golden scales how much injury a party has sustained by a trespass" (*d*).

If the act of conversion amounts to pound breach, the party guilty of

(*x*) *Mortimer* v. *Cradock*, 12 Law J., C. P. 166.

(*y*) *Rundle* v. *Little*, 6 Q. B. 178.

(*z*) *Greening* v. *Wilkinson*, 1 C. & P. 626.

(*a*) *Reid* v. *Fairbanks*, 13 C. B. 729; 22 Law J., C. P. 206.

(*b*) *Whitmore* v. *Black*, 13 M. & W. 509; 14 Law J., Exch. 19.

(*c*) *Glasspool* v. *Young*, 9 B. & C. 696; 4 M. & R. 533.

(*d*) *Lockley* v. *Pye*, 8 M. & W. 135.

the wrong will be liable in damages to the landlord, and also to the owner of the property for damages for the conversion. "It might be difficult in such a case to ascertain the damages, but they would not exceed in the whole the value of the chattels distrained" (*e*).

Assessment of damages where the plaintiff has only a limited or doubtful interest in the goods.— Where the plaintiff is not the actual owner, but is only a bailee or hirer, of goods which have been wrongfully taken out of his possession, he is entitled as against a stranger to recover the entire value of the goods; but if the action is brought by the hirer or bailee against the owner of the goods, the damages will be limited to the value of the plaintiff's interest in them (*f*). A defendant who has wrongfully deprived the plaintiff of the possession of goods cannot avail himself of the title of a third party in reduction of damages, but he may show that he was himself the owner of the goods at the time of the conversion, subject to some temporary or conditional right of possession on the part of the plaintiff, with a view of limiting the damages to the value of the plaintiff's limited interest (*g*). If a man brings an action for the conversion of a ship, and upon the evidence it appears that he has but the sixteenth part of it, this will go in reduction of damages, as he has no right to recover the value of the shares of the other part-owners (*h*). If it appears that the plaintiff has merely been clothed with the possession and ostensible ownership of the chattels, for the purpose of perpetrating a fraud or defeating a distress, or if he has made a transfer of the chattels, which he has treated at one period as valid and *bonâ fide*, and at another as merely colourable, so as to leave it doubtful what is his real and *bonâ fide* interest in the property, the jury may, if they please, give him merely nominal damages (*i*).

Damages for the conversion of bills and notes are calculated, in general, according to the amount of principal and interest due upon the bills or notes at the time of the demand and refusal to deliver them up (*k*). But if a document, purporting to be a bill or note, has been lost or accidentally destroyed, and the defendant is unable to deliver it up, and can prove that it was not a genuine security, and was of no value at all at the time of the conversion, nominal damages only may be recoverable, if the plaintiff is entitled to recover damages at all (*l*). If the security has been mutilated and rendered valueless by the wrongful act of the defendant, the plaintiff will be entitled to recover what it would have

(*e*) *Turner* v. *Ford*, 15 M. & W. 215.
(*f*) *Heydon & Smith's* case, 13 Co. 68. *Waters* v. *Monarch*, 5 Ell. & Bl. 880; 25 Law J., Q. B. 102.
(*g*) *Brierley* v. *Kendall*, 17 Q. B. 943.
(*h*) *Dockwray* v. *Dickenson*, Skin. 640.
(*i*) *Cameron* v. *Wynch*, 2 C. & K. 264. *Pringle* v. *Taylor*, 2 Taunt. 150.
(*k*) *Mercer* v. *Jones*, 3 Campb. 477.
(*l*) *Mathew* v. *Sherwell*, 2 Taunt. 438. *Wills* v. *Wells*, 8 ib. 267; 2 Moore, 254.

been fairly worth to him had it continued a perfect and complete instrument (*m*).

Of the damages recoverable when the plaintiff has offered to return the goods, or the defendant has received them back after the commencement of the action. —If in the course of the cause the goods have been returned, the plaintiff is still entitled to proceed for further damages and his costs (*n*). When the goods have been returned and received unconditionally by the plaintiff, after the commencement of the action, and no special damage is alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, nominal damages only are recoverable. When substantial damages have been recovered, notwithstanding the return of the goods after the commencement of the action, there has been either an injury to the property converted, or the damage has been the actual and necessary consequence of the conversion; as in the case of the detention or conversion of a riding-horse, where the horse may have been deteriorated by ill-usage, or where the plaintiff could not get back his horse without paying certain charges for his keep (*o*), the payment being a necessary consequence of the conversion. But the plaintiff, although he has taken upon himself to accept the goods without imposing any condition upon the defendant, has a right to go on with the action, and proceed to trial for the purpose of recovering his costs (*p*).

Damages, in the nature of interest, over and above the value of the goods. —By the stat. 3 & 4 Wm. 4, c. 42, s. 29, it is enacted, that in all actions of trover or trespass *de bonis asportatis*, the jury, on the trial of any issue, or any inquisition of damages, may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof.

Special damages, far exceeding the value of the goods, are recoverable if specified and claimed in the declaration, and shown to be the natural and necessary consequence of the wrongful act. Thus, where the plaintiff complained, not only that the defendant took his goods, but that he did so under a false and unfounded claim of right, and that the plaintiff was thereby much annoyed and prejudiced in his business, and believed to be insolvent, and that by means of the premises certain lodgers were induced to believe that the plaintiff was in embarrassed circumstances, and that the defendant was entitled to seize the goods for a debt, and left the house, it was held that the jury might give vindictive damages for the injury, over and above the value of the goods seized (*q*).

Where a carpenter's tools have been detained or converted, and the

(*m*) *M'Leod* v. *M'Ghie*, 2 Sc. N. R. 604.

(*n*) *Laugher* v. *Brefitt*, 5 B. & Ald. 765; 1 D. & R. 417.

(*o*) *Syeds* v. *Hay*, 3 Burr. 1364.

(*p*) *Moon* v. *Raphael*, 2 Bing. N. C. 314.

(*q*) *Brewer* v. *Dew*, 11 M. & W. 629; post, ch. 22.

carpenter, by reason thereof, has lost a valuable job, or been unable to earn his customary wages, damages far beyond the value of the tools may be recovered (*r*). So if, by reason of the unlawful detention of goods, the owner of them has been prevented from fulfilling a contract, or reaping the benefit of a bargain he had made, he is entitled to compensation for the special damage he has sustained, although performance of the contract or bargain could not have been enforced by compulsion of law (*s*). If, in an action for the conversion of a horse, the plaintiff claims damages in respect of his being obliged to hire other horses for his use, in consequence of his being deprived of his own horse, he will be entitled to recover the amount expended by him in horse-hire, in addition to the value of his own horse at the time of the conversion (*t*). A person who has wrongfully taken goods, and handed them over to a third party, is, under certain circumstances, bound to pay what it has cost the owner of the goods to get them out of the possession of the person into whose hands they have been wrongfully delivered (*u*).

Damages in actions for seizures under the Customs' Acts.—By 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any action shall be commenced and brought to trial against any person on account of the seizure of any vessel, boat, goods, &c., as forfeited under any act relating to the customs, wherein a verdict shall be given against the defendant, if the court or judge before whom the suit has been tried shall have certified on the record that there was a probable cause for such seizure, then the plaintiff, besides the thing seized, or the value thereof, shall not be entitled to above twopence damages, nor to any costs of suit (*x*).

(*r*) *Bodley* v. *Reynolds*, 8 Q. B. 779.
(*s*) *Waters* v. *Towers*, 8 Exch. 401; 22 Law J., Exch. 186. *Wood* v. *Bell*, 25 ib. Q. B. 153.
(*t*) *Davis* v. *Oswell*, 7 C. & P. 804.
(*u*) *Kaene* v. *Dilk*, 4 Exch. 388. *Pritchet* v. *Boevey*, 1 Cr. & M. 778.
(*x*) And see further as to damages, post, ch. 22.

CHAPTER VIII

OF TRESPASSES AND INJURIES FROM NEGLIGENCE—NEGLIGENT MANAGEMENT OF CHATTELS.

SECTION I.—*Of trespasses and injuries from acts of negligence.*—Negligence and inevitable accident—Negligence of carriers of passengers—When the very occurrence of a railway accident is *primâ facie* proof of negligence—Negligent driving and management of horses and carriages,—Secret defects in carriages—Liability of the master for the negligence of the servant—Identification of the passenger with the driver—Negligence of foot-passengers in public thoroughfares—Negligent navigation of vessels—Collision with foreign ships—Non-observance of statutory or admiralty regulations—Damage to owners of cargoes—Negligence of masters and employers causing injury to their servants—Injuries to servants from the negligence of their fellow-servants—Volunteers in dangerous employments—Contributory negligence on the part of the plaintiff—Negligence on the part of skilled workmen and professional men—Negligence of attornies and barristers.

SECTION II.—*Of actions for negligence.*—Actions for compensating the families of persons killed by negligence—Proceedings in the Court of Admiralty—Parties to be made plaintiffs and defendants—Master and servant—Contractor and sub-contractor—Pleadings, defences, and evidence—Damages recoverable—Where the plaintiff is insured—Where the action is brought by personal representatives.

SECTION I.

OF TRESPASSES AND INJURIES FROM NEGLIGENCE—NEGLIGENT MANAGEMENT OF CHATTELS.

Negligence and inevitable accident.—No person may, as we have seen, be excused of a trespass except it be adjudged to have been committed entirely without fault, or to have been an inevitable accident, or to have been occasioned by the negligence of the plaintiff himself. "Looking into all the cases from the year-book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be," observes Grose, J., "that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet

he is answerable" (*y*). Where to an action of trespass the defendant pleaded that he was a soldier of the trained bands, and was skirmishing with muskets charged with powder for exercise *in re militari*, and that in discharging his musket he accidentally and unintentionally injured the plaintiff; it was held that the plea, being a mere excuse, and no justification, afforded no answer to the action (*z*). And where the defendant was uncocking his gun, and the plaintiff was stopping to see it, and the gun went off and wounded the plaintiff, it was held that the plaintiff might maintain an action for the injury (*a*). So, where the defendant intrusted a loaded gun to be carried by an inexperienced servant girl, and the girl pointed the gun in sport at the plaintiff, and drew the trigger, and shot him in the eye, and blinded him, it was held that the defendant was responsible in damages for the consequences of his carelessness (*b*). And where the defendant gave the plaintiff a carboy, or large bottle of nitric acid, to carry, without informing him of the dangerous nature of the acid, and the carboy burst, and the acid inflicted dangerous wounds upon the plaintiff, and burnt and destroyed his clothes, and disabled him, it was held that the defendant was responsible in damages for the injury (*c*). But if the injury has resulted from circumstances over which the defendant had no control, he is not then answerable. This has been held to be the case where the defendant's horse, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*d*); also where a horse, naturally vicious, but not known to be so by the defendant who was riding it, became restive and unmanageable, and ran upon the foot-pavement and knocked down and killed the plaintiff's husband (*e*); and where a horse, ridden by the defendant, was frightened by a clap of thunder, and ran over the plaintiff, who was incautiously standing with others in the carriage-road (*f*).

If a horse, not known to be of a vicious disposition by the rider, suddenly kicks out without provocation and injures a by-stander, the rider will not be responsible for the injury; but it is otherwise if the injury is caused by an incautious and dangerous use of the spur (*g*).

By the civil law, all the losses and damages which result from the act of another, whether through imprudence, rashness, ignorance, or other faults, are to be made good by him whose imprudence, or other fault,

(*y*) *Leame* v. *Bray*, 3 East, 599, ante, p. 2.

(*z*) *Weaver* v. *Ward*, Hob. 134. *Dickenson* v. *Watson*, 2 Jones, 205.

(*a*) *Underwood* v. *Hewson*, 1 Str. 596.

(*b*) *Dixon* v. *Bell*, 5 M. & S. 198.

(*c*) *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 137.

(*d*) *Wakeman* v. *Robinson*, 1 Bing. 213; 8 Moore, 63.

(*e*) *Hammack* v. *White*, 11 C. B., N. S. 588; 31 Law J., C. P. 129.

(*f*) *Gibbons* v. *Pepper*, 1 Ld. Raym. 38.

(*g*) *North* v. *Smith*, 10 C. B., N. S. 575.

caused the mischief; for it is a wrong that he hath done, although he had no intention to do harm. Thus he who plays imprudently at a game in a place where there may be danger to others passing by, is answerable for the harm he does (*h*). A waggoner, or a mule-driver, who hath not strength or skill enough to hold in a mettlesome horse, or an unruly mule, will be answerable for the damage caused thereby; for he ought not to have undertaken what he had not skill or strength enough to perform. If, by overloading a horse or other beast, or by not avoiding a dangerous path, or by some other neglect, he causes damage to another, he will be answerable; and he who sustains the damage may have his action against the driver, or against the person who employed him (*i*).

Negligence of carriers of passengers for hire.—Every carrier of passengers for hire, whether he be or be not a common carrier (post, ch. 10), is bound to exercise the greatest care and forethought for securing the safety of his passengers, and is answerable for the smallest negligence on his own part, or on the part of his servants and agents (*j*), but not for unforeseen accidents and misfortunes, which care and vigilance could not have provided against or prevented. He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety." "When everything has been done that human prudence can suggest, an accident may happen. The lights may in a dark night be obscured by fog; the horses frightened; or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journeys; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." But the breaking down or overturning of a coach is *primâ facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident" (*k*). When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers. If the driver of a railway-engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages and injuries that may

(*h*) Domat. liv. 2, tit. 8, s. 4.
(*i*) Ib. liv. 2, tit. 8, s. 2, § 5.
(*j*) *Jackson* v. *Tollett*, 2 Stark. 38. *Dudley* v. *Smith*, 1 Campb. 169.
(*k*) *Crofts* v. *Waterhouse*, 11 Moore, 137; 3 Bing. 321. *Sharp* v. *Grey*, 2 M. & Sc. 620; 9 Bing. 460. *Harris* v. *Costar*, 1 C. & P. 637.

have been sustained by the passengers (*l*). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences (*m*).

When the very occurrence of a railway accident is primâ facie proof of negligence.—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *primâ facie* proof of negligence on the part of such company, or its officers, and to throw upon them the burthen of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part (*n*). If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (ante, p. 323), there will be nothing to establish even a *primâ facie* case of negligence against the company (*o*). But if the railway-bridges or viaducts have not been properly constructed, or have not been carefully maintained and repaired, so as to enable them to resist the violence of storms and floods which may be expected occasionally to occur, and injuries are thereby caused to passengers (*p*), the railway company will be responsible in damages, although they may have employed competent engineers and workmen, and have used the best materials in the work (*q*).

When a railway crosses a turnpike-road on a level adjoining to a station, the trains must slacken their speed before arriving at the turnpike-road, and cannot, unless there is some special provision to the contrary in the particular act under which the company is incorporated, cross the same at any greater rate of speed than four miles an hour (*r*).

Injuries from secret defects in carriages.—A coach with a defective axle-tree is not roadworthy, and a coach-proprietor who sends out a coach with such a defect is responsible for the consequences, whether he does or does not know of the defect at the time the coach starts (*s*). A coach

(*l*) *Collett* v. *Lond. & N. W. Rail. Co.*, 16 Q. B. 984. *Skinner* v. *Lond. Br. &c. Rail. Co.*, 5 Exch. 787.

(*m*) *Latch* v. *Rumner Rail. Co.*, 27 Law J., Exch. 155.

(*n*) *Carpue* v. *Lond. & Br. Rail Co.*, 5 Q. B. 751. *Latch* v. *Rumner Rail. Co.*, 27 Law J., Exch. 155. *Dawson* v. *Manch. &c. Rail. Co.*, 5 Law T. R., N. S. 682.

(*o*) *Bird* v. *Gt. Northern Rail. Co.*, 28 Law J., Exch. 3.

(*p*) *Gt. West. &c. of Canada* v. *Fawcett*, 8 L. T. R., N. S. 31.

(*q*) *Grote* v. *Chester & Holyhead Rail. Co.*, 2 Exch. 255.

(*r*) 8 & 9 Vict. c. 20, s. 48.

(*s*) *Sharp* v. *Grey*, 9 Bing. 459; 2 M. & Sc. 623. Gaselee, J., observing that there was a material distinction between that case and the case of *Christie* v. *Griggs*, 2 Campb. 79. *Grote* v. *Chester & Holyhead Rail. Co.*, 2 Exch. 255.

which is overloaded is not roadworthy, and if it upsets, in consequence of its being top-heavy, the coachman and coach-proprietor will be responsible in damages (*t*).

Collisions in public thoroughfares—Negligent driving.—A person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road (*u*). A foot-passenger is not bound to keep on the foot-pavement; he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it (*x*). "It is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages" (*y*). If a person driving his own carriage takes another person into it as a passenger, such person cannot be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, both will be answerable for any accident arising from the misconduct of either in the driving of the carriage while it was so in their joint care (*z*). It is not enough to give warning to a party to get out of the way of a carriage to exonerate parties from responsibility for carelessness (*a*).

Liability of the master for the negligence of his servant.—Whatever a servant does in order to give effect to his master's will may be treated, as we have seen, as the act of the master (*b*). But if my servant, without my knowledge, wrongfully takes my carriage, or my horse, for his own purposes, and drives against another person's carriage, I shall not be responsible for the injury; for when the servant takes the master's carriage or horse, and uses it under such circumstances, he gains a special property for the time being in the chattel, and makes it for the time, and for the particular wrongful purpose, his own (*c*). Where the defendant's coachman was driving the defendant's carriage through a narrow street, which was blocked up by a luggage-van, containing goods of the plaintiff, which were being unladen, and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box and laid

(*t*) *Israel* v. *Clark*, 4 Esp. 259. *Aston* v. *Heaven*, 2 Esp. 535.

(*u*) *Pluckwell* v. *Wilson*, 5 C. & P. 375.

(*x*) *Boss* v. *Litton*, ib. 407.

(*y*) Pollock, C. B., *Williams* v. *Richards*, 3 C. & K. 82. Erle, C. J., *Cotton* v. *Wood*, 8 C. B., N. S. 571.

(*z*) *Davey* v. *Chamberlain*, 4 Esp. 229.

(*a*) *Woolley* v. *Scovell*, 3 M. & R. 105.

(*b*) Ante, p. 20. Alderson, B., *Hutchinson* v. *York, Newc. &c.*, 5 Exch. 350.

(*c*) *M'Manus* v. *Crickett*, 1 East, 106; 2 Roll. Abr. 553; ante, p. 21. *Sleath* v. *Wilson*, 9 C. & P. 607; qualified by *Seymour* v. *Greenwood*, ante, p. 21.

hold of the van-horse's head, and moved the van, and caused a large packing-case to tumble on the shafts of the gig, and break them, it was held that the defendant was not liable for the injury, the servant at the time not being in the execution of his master's orders, or doing his master's work (*d*).

But whenever the master has intrusted the servant with the control of his carriage or horses, it is no answer that the servant disobeyed his master's orders, and did what he had no business to do, or went where he had no business to go. If the servant, driving his master's carriage, on his master's business, disobeys the express instructions of the latter, and wilfully or maliciously does what he has been ordered not to do, or makes a détour to call on a friend, or to gratify some purpose of his own, and carelessly drives against another vehicle, the master will nevertheless be answerable for the injury; but if the servant was going on a frolic of his own, without being at all on his master's business, then the master will not be liable (*e*).

If an omnibus-conductor uses unnecessary violence in expelling a drunken passenger from an omnibus, the proprietor of the omnibus will, as we have seen, be responsible in damages for the misconduct of his servant (*f*).

Liabilities of owners of carriages let to hire who select and send their own coachmen.—If carriages and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injuries resulting from the negligent and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer (*g*). But if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot of course be made responsible for the negligence or want of skill of the coachman (*h*). Two old ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day, or drive. They gave the driver a gratuity for each day's drive, provided him with a livery-hat and coat, which were kept in their house, and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage, and inflicted an injury upon the plaintiff, and it was held that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master (*i*). But if any directions are given by the hirer of the horses to the driver or postillion

(*d*) *Lamb* v. *Palk*, 9 C. & P. 631.

(*e*) *Limpus* v. *Lond. Gen. Omnibus Co.*, ante, p. 22. *Joel* v. *Morrison*, 6 C. & P. 503. *Mitchell* v. *Crassweller*, 17 Jur. 717.

(*f*) *Seymour* v. *Greenwood*, ante, p. 21.

(*g*) *Laugher* v. *Pointer*, 5 B. & C. 572; 8 D. & R. 556. *Smith* v. *Lawrence*, 2 M. & R. 2. *Sammell* v. *Wright*, 5 Esp. 262. *Dean* v. *Branthwaite*, ib. 36.

(*h*) *Croft* v. *Alison*, 4 B. & Ald. 590. *Hall* v. *Pickard*, 3 Campb. 187.

(*i*) *Quarman* v. *Burnett*, 6 M. & W. 507. *Laugher* v. *Pointer*, 5 B. & C. 547.

to break through a line of carriages, or to do any unusual, improper, or aggressive act, or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given (*k*). "It is undoubtedly true," observes Parke, B., "that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of" (*l*).

The servant himself, by whose negligence or want of skill the accident has occurred, cannot defend himself against the claim of a third person by setting up that he was acting under the orders of his master, and that the act complained of was his master's act, and that the master alone is responsible (*m*).

Liabilities of borrowers of carriages for the negligence of their drivers.—A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend, whom he allows to drive, is responsible for the negligence of the driver, on a declaration charging that he was possessed of, and driving, the horse and chaise, and that the injury was occasioned by his negligent driving (*n*).

Identification of the passenger with his driver.—When a collision between two carriages has been caused by negligent driving on both sides, neither party can recover damages from the other (post, p. 333); and it has been held that every passenger who has selected the particular conveyance by which he travels is so far identified with the driver or director of its movements, that if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver and that of the driver of the rival conveyance, precluding the former from maintaining an action against the latter, the passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter (*o*). But "it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver, or his employer. Why both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it has received" (*p*). Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to

(*k*) *M'Laughlin* v. *Pryor*, 4 Sc. N. R. 665.

(*l*) *Quarman* v. *Burnett*, 6 M. & W. 499.

(*m*) Alderson, B., 5 Exch. 350.

(*n*) *Wheatley* v. *Patrick*, 2 M. & W. 650.

(*o*) *Thorogood* v. *Bryan*, 8 C. B. 131.

(*p*) Note to *Ashby* v. *White*, 1 Smith's L. C. 220.

get before the other, and both driving at great speed, and trying to avoid a cart which got in their way, and the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver (*q*).

Negligence of servants in breaking-in and training horses.—In an action on the case brought both against a master and his servant, the plaintiff set forth that the defendants brought a coach with two ungovernable horses into Lincoln's Inn Fields, where people were always going to and fro upon their business, and there, "improvide et absque debitâ consideratione ineptitudinis loci," drove them to make them tractable and fit for a coach, and that the horses, being unmanageable, ran upon and injured the plaintiff; and it was urged that the master, being absent, the action was not maintainable against him — that no knowledge of the horses being unruly, nor any negligence was alleged, but judgment was given for the plaintiff (*r*).

Collisions in public thoroughfares.—The degree of care to be exercised by foot-passengers in a public thoroughfare to prevent collisions with others, depends in a great degree upon the injury that will be likely to result to others from their want of care. Thus a man who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such a person would be bound to keep a better look-out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands.

Collisions between vessels — Negligence and inevitable accident.—If a shipowner unnecessarily delays mooring his vessel until night comes on, and darkness prevents him from distinguishing objects, he will be responsible in damages if he comes into collision with any other vessel, which collision could have been avoided if it had been daylight (*s*). S. 388 of the Merchant Shipping Act, 17 & 18 Vict. c. 104, protects the owners or masters of a ship from liability for loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of the pilot is made compulsory by law (*t*). This act and the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63, s. 54), regulate the extent of the liability of shipowners

(*q*) *Rigby* v. *Hewitt*, 5 Exch. 240. *Greenland* v. *Chaplin*, ib. 247. And see the remarks of Dr. Lushington, *The Milan*, 31 Law J., Adm. 112.

(*r*) *Michael* v. *Alestree*, 2 Lev. 173.

(*s*) *The Egyptian*, 8 L. T. R., N. S. 776.

(*t*) *The Schwalbe*, 14 Moore, P. C. C. 241. *The Annapolis*, 1 Lush. 295. *The Peerless*, 30 Law J., Adm. 89.

and owners of shares in sea-going ships where, without any actual fault or privity on their parts, any loss of life or personal injury is caused to any person being carried in such ship; also, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; also, where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship, caused to any person carried in any other ship or boat, or is caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat (*u*.) The cargo laden on board ship is not liable, like the ship itself, to make good the damage (*x*).

In case of loss of life, or personal injury, the Board of Trade may cause juries to be summoned to assess compensation (ss. 507, 508), of a very limited character. Provision is made (s. 510) for the application and distribution of these damages to the parties entitled to them, and if they are dissatisfied with the amount they may, on procuring the amount thereof to be refunded, bring an action for the recovery of damages under various discouraging limitations and restrictions. Nothing, however, in the act is (s. 516) to lessen or take away any liability to which any master or seaman, being also owner, or part owner, of the ship to which he belongs, is subject in his capacity of master or seaman.

Proceedings *in rem* in the Admiralty court are no bar to proceedings elsewhere *in personam* (*y*).

Collisions with foreign ships.—The regulations for preventing collisions contained in 25 & 26 Vict. c. 63, are expressly extended (ss. 57–64) to foreign ships navigating within British jurisdiction, and may be extended to the high seas by consent of foreign countries in the manner therein mentioned.

Non-observance of statutory or Admiralty regulations.—Under the Merchant Shipping Acts, 17 & 18 Vict. c. 104, ss. 295–299, and 25 & 26 Vict. c. 63, s. 25, *et seq.*, and Sched. Table C, regulations are to be made by the Admiralty for the exhibition by steam-boats and sailing-vessels of lights at night in such places and under such circumstances as the Admiralty think fit, and certain rules are required to be observed by vessels passing each other; and it is enacted that if a collision between vessels appears to have been occasioned by the non-observance of the Admiralty or statutory rules, the vessel by which any rule has been infringed shall (s. 29) be deemed to be in fault (*z*), unless it appears to the court that the circumstances made a departure from the regulation necessary; and in case of damage to person or property from non-observance of any rule,

(*u*) As to the method to be adopted in ascertaining the liability of the defendants for the several sorts of damage, see *Nixon* v. *Roberts*, 1 Johns. & Hem. 742–748; 30 Law J., Ch. 844.

(*x*) *The Victor*, 1 Lush. 72.

(*y*) *Nelson* v. *Couch*, 2 N. R. 395.

(*z*) *Dowell* v. *Gen. St. Nav. Co.*, 5 Ell. & Bl. 195; 26 Law J., Q. B. 59. *The James*, 1 Swabey, 60.

the same shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the vessel, unless it appears to the court that the circumstances made a departure from the regulation necessary.

The old rule of the Admiralty court, therefore, that if the owner of one ship brings an action against the owner of another ship for damage by collision, and both vessels be to blame, the damage shall be divided, has, to a certain extent, been superseded by the provisions of this statute (*a*). But the owner on board a ship that has violated the provisions of this statute, and so contributed to the collision, is not prohibited by the Merchant Shipping Act from recovering compensation, in accordance with the old rule of the Admiralty, to the extent of a moiety of his loss (*b*).

Notwithstanding this statute, and the Admiralty regulations founded thereon, persons, in navigating their vessels, are still bound to keep a good look-out, just as they were before these regulations were made; and if it could clearly be made out that a vessel, having no light, had been run down by another vessel, from sheer carelessness and negligence in not keeping a good look-out, the owners of such vessel would have a right to compensation from the wrong-doers (*c*). Every vessel, whether close-hauled or at anchor, is bound to show a light (*d*). Although the damage resulting from a collision may be greatly increased by some neglect or default on the part of the plaintiff, yet if the plaintiff's neglect has not caused or contributed to the collision, he is not thereby precluded from recovering damages (*e*); but if the fault of the plaintiff himself is the proximate cause of the collision, he cannot recover in a court of common law: if it is only remotely connected with the accident, then the question is, whether the defendant, by ordinary care, might have avoided the accident, and if he might, the plaintiff is entitled to recover (*f*). In all cases of collision between ships, it is the duty of the person in charge of each ship to render all practicable assistance, and, in case of failure so to do, with no reasonable excuse shown, the neglect will be *primâ* evidence of negligence on the part of the person in charge so making default (*g*).

A Queen's officer, stationed on board ship to do his duty there, together with others equally appointed, and stationed there by the same authority to do their several duties, is not responsible in damages for injuries occasioned by the negligence of his subordinate officers in carrying into effect the orders given by him in discharge of his public duty.

(*a*) *Lawson* v. *Carr*, 10 Moore, P. C. C. 162.
(*b*) *The Milan*, 31 Law J., Adm. 105.
(*c*) *Morrison* v. *Gen. Steam Nav. Co.*, 8 Exch. 738.
(*d*) *The Eclipse*, 31 Law J., Adm. 201.
(*e*) *Greenland* v. *Chaplin*, 5 Exch. 247.
(*f*) *Tuff* v. *Warman*, 2 C. B., N. S. 740; 26 Law J., C. P. 263. *The Vivid*, 1 Swabey, 88; ante, p. 18.
(*g*) 25 & 26 Vict. c. 63, s. 33.

Therefore, the captain of a sloop-of-war is not answerable for damage done by her in running down another vessel during the watch of the lieutenant who was upon the deck, and had the actual direction and management of the steering and navigating of the sloop at the time (*h*).

The mere fact of a ship being chartered and employed by the government as an armed vessel, and having a commander of the navy on board, under whose orders the vessel is navigated, will not exempt the shipowners from responsibility for injuries occasioned by the negligence of a master and crew shipped on board, and paid by them (*i*). But no action is maintainable against the owners of a transport in the employ of government for damage done in the careful and proper execution of the orders of a government officer, under whose command the vessel was at the time of the accident, unless the order was only meant to apply to a particular state of circumstances, and to leave a certain discretion in the master of the transport, and the circumstances change, and the master carelessly and imprudently fails to direct his conduct in accordance with the altered circumstances and the requirements of good seamanship (*j*).

Negligent navigation causing damage to owners of cargoes.—The owner of a cargo on board a ship is entitled, as we have seen, to recover compensation for damage sustained by collision through negligence. He may sue the shipowner, if the latter is in default, and, if not, he is entitled to sue the wrong-doer causing the damage. And the owner of a cargo on board of one of two delinquent ships is not precluded in the Court of Admiralty from recovering from the other delinquent ship a moiety of the damage he has sustained, for he is not there considered to be in anywise identified with the negligent management of the ship he has selected to carry his goods, nor to be in anywise responsible for the collision (*k*).

Negligence of masters causing injury to their servants.—Every workman who engages in a dangerous employment takes it, as we have seen (ante, p. 155), with all its ordinary risks. The master is bound to provide for the safety of his servant in the course of his employment, to the best of his judgment (*l*); but the law does not impose upon the master the obligation of taking more care of the servant than he may be reasonably expected to take of himself. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or

(*h*) *Nicholson* v. *Mouncey*, 15 East, 384.
(*i*) *Fletcher* v. *Braddick*, 2 N. R. 182. Best, J., *Scott* v. *Scott*, 2 Stark. 438.
(*j*) *Hodgkinson* v. *Fernie*, 2 C. B., N. S. 415; 26 Law J., C. P. 219.
(*k*) *The Milan*, ante, p. 329.
(*l*) *Paterson* v. *Wallace*, 1 Macq. 751.

through the breaking down of a van or carriage in which the servant is directed by the master to ride or drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do (*m*), or through the use of dangerous machinery, with the use of which the servant is, or professes to be, acquainted, and which he has voluntarily undertaken to use (*n*), or for the dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which the workman has voluntarily undertaken to mount with as much knowledge of the attendant risk as the person who employs him (*o*).

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish the latter with sound roadworthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for the injury. The law does not permit him to recover damages from his own master and employer. Neither can he sue the coach-maker whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought not to be influenced" (*p*).

The master is bound, as we have seen (ante, pp. 155–157), to protect his servant from latent dangers on the master's premises, known to the latter and not known to the servant. If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct (*q*). For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable (*r*). And where rules are framed by employers for the purpose of regulating the management and exercise of a dangerous employment, and these rules are carelessly or improperly framed, so as to cause dangers and risks, which might be guarded against and prevented by proper rules carefully prepared, the employers will be responsible for the consequences of their negligence (*s*). Where statutory regulations exist for the management of a colliery, and securing the safety of the workmen, and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the party injured has brought

(*m*) *Skipp* v. *East. Co. Rail. Co.*, 9 Exch. 223.

(*n*) *Dynen* v. *Leach*, 26 Law J., Exch. 221.

(*o*) *Assop* v. *Yates*, 2 H. & N. 770; 27 Law J., Exch. 156. *Griffiths* v. *Gidlow*, ib. 404. *Potts* v. *Plunkett*, 9 Ir. C. L. R. 290.

(*p*) *Winterbottom* v. *Wright*, 10 M. & W. 115. *Priestley* v. *Fowler*, 3 M. & W. 6. *Riley* v. *Baxendale*, 6 H. & N. 455; 30 Law J., Exch. 87. *Potts* v. *Port Carlisle, &c. R. Co.*, 2 Law T. R., N. S. 283.

(*q*) *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 295. *Mellors* v. *Shaw*, 30 Law J., C. P. 333. *Weems* v. *Matthieson*, 4 Macq. H. L. C. 215. *Farrant* v. *Barnes*, 31 Law J., C. P. 139.

(*r*) *Ashworth* v. *Stanwix*, 30 Law J., Q. B. 183.

(*s*) *Vose* v. *Lanc. & York Rail. Co.*, ante, p. 152.

the mischief upon himself by his own negligence (*t*). And in a case where machinery is required by act of parliament to be protected, so as to guard persons working near it from danger, and a servant complains of the want of protection, and continues to work in the mill near the machinery on the faith of a promise by the master that the requisite protection shall be afforded, the master will be responsible if any accident occurs to the servant in the interval, from the want of such protection, unless the accident has been caused by the negligence of the servant himself (*u*).

Injuries to one fellow-servant from the negligence of another fellow-servant.— Where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks (*x*), and has been guilty of no want of care in the selection of proper servants (*y*). The principle laid down is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risk of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. Thus it has been held that a railway company is not responsible for an injury occasioned to one of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire (*z*). But the servants must be fellow-servants, engaged in a common service; for if a farmer's servant, delivering corn at the warehouse of a corn merchant, is injured by the negligence of the corn merchant's servant in taking in the sacks, the corn merchant would be answerable for the injury (*a*). And it is not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be employed in the same work: for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger (*b*). And if a fellow-workman in a mine is also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master is then

(*t*) *Caswell* v. *Worth*, 5 Ell. & Bl. 855. *Senior* v. *Ward*, Ell. & Ell. 385; 28 Law J., Q. B. 139; and see ante, pp. 152–158.

(*u*) *Holmes* v. *Clarke*, 6 H. & N. 349; 30 Law J., Exch. 135. *Cowley* v. *Mayor &c. of Sunderland*, ib. 127.

(*x*) *Hutchinson* v. *York, &c. Rail. Co.*, 5 Exch. 353. *Wiggett* v. *Fox*, 11 Exch. 837; 25 Law J., Exch. 188. *Searle* v. *Lindsay*, 11 C. B., N. S. 429; 31 Law J., C. P. 106.

(*y*) *Tarrant* v. *Webb*, 18 C. B. 805.

(*z*) *M'Eniry* v. *Waterford*, 8 Ir. C. L. R. 312.

(*a*) *Abraham* v. *Reynolds*, 5 H. & N. 149; 6 Jur. N. S. 53; 8 W. R. 81. *Waller* v. *S. E. R. Co.*, 32 Law J., Exch. 205; 8 L. T. R., N. S. 325; 11 W. R. 731.

(*b*) Ld. Cranworth, *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 294, 307.

responsible for injury caused by the negligence of such fellow-workman (*c*). A sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, are all fellow-servants, engaged in one common employment, though each directs and limits his attention to particular branches of the work, and they all are held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants engaged in discharging the work of their common employer (*d*).

Injuries to volunteers who assist gratuitously in work of a dangerous nature.—If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and the volunteer gets injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater duties on the employer, than would have existed if he had been a hired servant (*e*).

Contributory negligence on the part of the plaintiff himself.—A plaintiff cannot, as previously mentioned, recover damages in a court of common law if, but for his own negligence, or that of the person who represents him, the accident would not have happened, though there was negligence on the part of the defendant (*f*), for the plaintiff cannot complain of an injury which his own negligence and want of care has contributed to bring upon him (*g*). If, therefore, children stray upon a railway, and get injured by a passing train, damages cannot be recovered by them from the company, although there should be negligence in the management of the train (*h*). If a person of full age and mature judgment gets up into the defendant's cart, without any right so to do, and sustains an injury from the negligence of the defendant's servant, the party so trespassing is precluded from recovering damages from the defendant (*i*). "If," observes Domat, "any one goes across a public cricket-ground whilst people are playing there, and the ball, being struck, chances to hurt him, the injury is to be imputed to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball" (*k*). Where the plaintiff and defendant,

(*c*) *Ashworth* v. *Stanwix*, 30 Law J., Q. B. 183.

(*d*) *Wiggett* v. *Fox*, 11 Exch. 832; 25 Law J., Exch. 193.

(*e*) *Degg* v. *Mid. Rail. Co.*, 1 H. & N. 773; 26 Law J., Exch. 173. *Potter* v. *Faulkner*, 1 B. & S. 800; 31 Law J., Q. B. 30.

(*f*) *Waite* v. *North-East. Rail. Co.*, Ell. Bl. & Ell. 719; 28 Law J., Q. B. 258; 27 Law J., Q. B. 417. *Tuff* v. *Warman*, 2 C. B., N. S. 740; 27 Law J., C. P. 322. *Senior* v. *Ward*, El. & El. 385; 28 ib. Q. B. 139. *Scott* v. *Dub. & Wick. Rail. Co.*, 11 Ir. Com. Law Rep. 377.

(*g*) Jervis, C. J., *Martin* v. *Gt. North. Rail. Co.*, 16 C. B. 192. *Wise* v. *Gt. West. Rail. Co.*, 1 H. & N. 63; 25 Law J., Exch. 261.

(*h*) *Singleton* v. *E. C. R. Co.*, 7 C. B., N. S. 287.

(*i*) *Lygo* v. *Newbold*, 9 Exch. 306; 23 Law J., Exch. 109. As to boys climbing on a cart, see *Lynch* v. *Nurdin*, ante, p. 17.

(*k*) Domat. liv. 2, tit. 8, s. 4.

being jointly interested in the pulling down and rebuilding of a party-wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and the plaintiff's house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. "Since the wall," observes Lord Ellenborough, "was taken down by both, neither could impute negligence to the other" (*l*). If an obstruction has been negligently placed in a public thoroughfare by the defendant, and the plaintiff has ridden against it, he cannot recover damages from the defendant if it appears that he was riding at an improper pace, or was intoxicated, and could have avoided the obstruction if he had ridden with reasonable and ordinary care (*m*). If the risk is obvious, the plaintiff ought not to incur it (*n*), but should proceed to remove the obstruction (ante, p. 164), or take legal proceedings for its removal, and for the recovery of the damages he has sustained by being deprived of the use of the thoroughfare. In the Court of Admiralty, in cases of collision, where both vessels are to blame, the damages, when recovered, are, as we have seen, divided between the delinquent ships (*o*).

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of the workman himself, the latter has no ground to recover damages from the employer for injuries sustained from the non-observance of the rule (*p*).

Negligence on the part of the plaintiff forming no impediment to an action for damages.—Negligence or misconduct on the part of the plaintiff himself does not, as we have seen, prevent him from recovering damages in those cases where the negligence or misconduct has not been an immediate co-operative cause of the injury of which he complains (*q*).

Injuries from the negligence of skilled workmen and professional men.—It is the duty of every workman who undertakes the performance of work to execute it with care and diligence, and with the ordinary amount of skill and knowledge incident to his particular craft, art, or profession. If a carpenter undertakes to roof a barn, or build a shed, and employs defective materials, or does his work so negligently and unskilfully that the roof, when finished, will not keep out the rain, he is responsible in damages to his employer (*r*). If a builder undertakes to build a house, and builds it out of the perpendicular, or neglects to examine the ground and secure proper foundations for the building, and constructs the walls

(*l*) *Hill* v. *Warren*, 2 Stark. 378.
(*m*) *Butterfield* v. *Forrester*, 11 East, 60.
(*n*) *Clayards* v. *Dethick*, 12 Q. B. 446.
(*o*) *The Milan*, ante, p. 329.
(*p*) *Senior* v. *Ward*, El. & El. 385; 28 Law J., Q. B. 139.
(*q*) Ante, pp. 17, 18.
(*r*) *Broom* v. *Davis*, cited *Batten* v. *Butter*, 7 East, 479, n. *Moneypenney* v. *Hartland*, 2 C. & P. 378.

so carelessly and negligently that a settlement and cracks make their appearance, and the structure becomes a dangerous nuisance, the builder is responsible in damages for negligence (*s*). The degree of skill and diligence which is required from the workman depends upon the nature and extent of his public profession, and rises in proportion to the value, the delicacy, and the beauty of the work he undertakes to execute, and the fragility and brittleness of the materials intrusted to him to work upon (*t*). Clock-makers, jewellers, opticians, and all kinds of skilled workmen, and all persons belonging to the learned professions, are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires (*u*). "Every person," observes Tindal, C. J., "who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair and competent degree of skill" (*x*).

Negligence of attornies and solicitors.—Every client has a right to the exercise, on the part of his attorney, of care and diligence in the execution of the business intrusted to him, and to a fair average amount of professional skill and knowledge; and if attornies have not as much of these qualities as they ought to possess, or if, having them, they have neglected to employ them, the law makes them responsible for the loss which has accrued to their clients from their deficiences (*y*). It is the duty of every attorney and solicitor to act with fidelity to his client, and to keep the secrets of the latter; for "if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause; or if an attorney act deceptive, to the prejudice of his client, or make default by collusion with others, whereby his client is injured, an action lies for damages" (*z*). If an attorney, when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences

(*s*) *Harman* v. *Cornelius*, 5 C. B., N. S. 236; 28 Law J., C. P. 88. *Farnsworth* v. *Garrard*, 1 Campb. 39. *Duncan* v. *Blundell*, 3 Stark. 7. *Munro* v. *Butt*, 8 Ell. & Bl. 738; 22 Jur. 731. *Williams* v. *Fitzmaurice*, 3 H. & N. 844.

(*t*) Addison on Contracts, 5th edit., 415.

(*u*) *Seare* v. *Prentice*, 8 East, 352. *Slater* v. *Baker*, 2 Wils. 359.

(*x*) *Lanphier* v. *Phipos*, 8 C. & P. 479. *Hancke* v. *Hooper*, 7 C. & P. 81.

(*y*) *Hart* v. *Frame*, 6 Cl. & Fin. 209. *Russell* v. *Palmer*, 2 Wils. 325.

(*z*) Com. Dig., *Action on the Case for Deceit*, A 5.

by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever an attorney finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the attorney has his client's title-deeds put into his hands for any purpose whatever, "he is to consider his lips sealed with a sacred silence as to the whole of their contents" (*a*).

It is also the duty of every attorney, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him (*b*).

If an attorney conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client (*c*). And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction (*d*), or negligently suffers judgment to go by default when he is retained to defend an action (*e*); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty intrusted to him; or if he is not present in person, or by his agent, at the trial, to see that the witnesses are forthcoming when called upon (*f*). When present at the trial, it is the duty of the attorney not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance (*g*); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter (*h*). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel (*i*), although that circumstance might go in reduction of damages.

(*a*) Tindal, C. J., *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

(*b*) *Stannard* v. *Ullithorne*, 4 M. & Sc. 376; 10 Bing. 491.

(*c*) *Bracey* v. *Carter*, 12 Ad. & E. 373. *Frankland* v. *Cole*, 2 Cr. & J. 590. *Pitt* v. *Yalden*, 4 Burr. 2063.

(*d*) *Williams* v. *Gibbs*, 6 N. & M. 788.

(*e*) *Godefroy* v. *Jay*, 5 M. & P. 297; 7 Bing. 419.

(*f*) *Hawkins* v. *Harwood*, 4 Exch. 506; 19 Law J., Exch. 33. *De Rougigny* v. *Peale*, 3 Taunt. 483. *Swannell* v. *Ellis*, 8 Moore, 340; 1 Bing. 347.

(*g*) *Reece* v. *Rigby*, 4 B. & Ald. 202.

(*h*) *Lowry* v. *Guildford*, 5 C. & P. 234.

(*i*) *Fray* v. *Voules*, El. & El. 839; 28 Law J., Q. B. 232.

"It would be extremely difficult," observes Tindal, C. J., "to define the exact amount of skill and diligence which an attorney undertakes to furnish in the conduct of a cause. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law, unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel" (*k*).

If an attorney is employed to investigate the title to an estate, or to seek out an eligible investment, and obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible in damages for negligence (*l*). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will (*m*). If he relies upon his own judgment and opinion as to the interpretation and legal operation of deeds and conveyances, he does so at his peril. If he draws a wrong conclusion from them, he will be responsible in damages to his client. He ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them (*n*).

If, when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether such intended mortgagor has ever taken the benefit of the Insolvent Act (*o*). If he neglects to register a judgment, or to file a cognovit or warrant of attorney, or to file writs, and his client sustains damage from his default, he will be responsible for the consequences (*p*).

(*k*) *Godefroy* v. *Dalton*, 6 Bing. 468. *Purves* v. *Landell*, 12 Cl. & Fin. 98. *Shilcock* v. *Passman*, 7 C. & P. 292. *Kemp* v. *Burt*, 4 B. & Ad. 431. *Long* v. *Orsi*, 18 C. B. 610. *Cox* v. *Leech*, 1 C. B., N. S. 617. *Ireson* v. *Pearman*, 3 B. & C. 812, 813. *Townley* v. *Jones*, 8 C. B., N. S. 289.

(*l*) *Knights* v. *Quarles*, 4 Moore, 532; 2 B. & B. 102. *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464. *Howell* v. *Young*, 5 B. & C. 259.

(*m*) *Wilson* v. *Tucker*, 3 Stark. 156.

(*n*) *Ireson* v. *Pearman*, 3 B. & C. 813; 5 D. & R. 699.

(*o*) *Cooper* v. *Stephenson*, 21 Law J., Q. B. 292.

(*p*) *Hunter* v. *Caldwell*, 10 Q. B. 82; 16 Law J., Q. B. 274.

Negligence of barristers.—There is no instance of any action having been successfully brought against a barrister for neglect of duty; but if a barrister intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible, like every other wrong-doer, for the mischief thereby occasioned (*q*).

SECTION II.

OF ACTIONS FOR NEGLIGENCE — DIRECT AND CONSEQUENTIAL INJURIES.

Actions for compensating the families of persons killed by negligence.—By 9 & 10 Vict. c. 93, it is enacted, that whensoever the death of a person shall be caused by any wrongful act, neglect, or default, which, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount in law to felony. And (s. 2) that every such action shall be for the benefit of the wife, husband, parent, and child of the deceased person, and shall be brought by, and in the name of, his executor or administrator, and the damages recovered, after deducting certain costs, shall be divided amongst the before-mentioned relatives, in such shares as the jury by their verdict shall find and direct. But not more than one action shall (s. 3) be brought in respect of the same subject-matter of complaint, and the action must be commenced within twelve calendar months after the death of the deceased person, and the plaintiff must deliver (s. 4), together with the declaration of his cause of action, a full particular of the persons on whose behalf the action is brought, and of the nature of the claim (*r*).

Contributory negligence on the part of the deceased will be a bar to an action by his personal representatives where the deceased himself, if he had lived, could have maintained no action for the injury (*s*). But if the circumstances of the negligence were such that, if death had not ensued, the deceased might have brought his action in respect of it, his representatives may maintain an action in respect of pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased himself, had he lived.

The loss of the benefit of education, and of the enjoyment of the comforts and conveniences of life, depending upon the possession of pecuniary means to obtain them through the death of a father whose income ceases

(*q*) *Swinfen* v. *Ld. Chelmsford*, 5 H. & N. 918; 29 Law J., Exch. 382.

(*r*) *Duckworth* v. *Johnson*, 4 H. & N. 653.

(*s*) Ante, pp. 16–18, *Contributory Negligence.*

with his life, is an injury in respect of which an action can be maintained on the statute; and so, also, is the loss of a pecuniary provision which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived; for wherever there is a reasonable expectation of pecuniary advantage from the prolongation of the life of a party, the extinction of such expectation by negligence occasioning his death will be sufficient to sustain an action upon the statute (*t*).

Actions at law, and proceedings in the High Court of Admiralty for negligence.—The High Court of Admiralty has jurisdiction over all causes of action arising from collisions between vessels caused by negligence either in a port or river, or on the British seas or high seas (*u*), and over any claim for damage done by any ship (*x*). The proceeding in the Court of Admiralty is an action *in rem*, the first step in the process being a seizure of the delinquent ship, which is impounded and detained to answer the plaintiff's claim; but the proceedings may be either *in rem* or *in personam* (*y*). The Trinity Masters attend to assist the court, and this has been thought to make it a desirable tribunal for the trial of causes involving questions of nautical skill and science (*z*). Proceedings *in rem* in the Admiralty court are no bar to an action for damages (*a*). In the Court of Admiralty, in cases of collision where both ships are to blame, and the provisions of the Merchant Shipping Act do not intervene, the owners of the cargo, equally with the owner of the ship, recover a moiety of the damage (*b*). The remedy is equally open to the shipowner and the owner of the cargo.

By the Mercantile Shipping Act, 1854 (17 & 18 Vict. c. 104), it is enacted (s. 512), that in cases where *loss of life* or *personal injury* has occurred by any accident, in respect of which the shipowner is alleged to be liable in damages, no person shall be entitled to bring an action until the completion of any inquiry that may be instituted by the Board of Trade, or until the Board of Trade has refused to institute an inquiry; and the Board of Trade is to be deemed to have refused whenever notice has been served on it by any person of his desire to bring an action, and no inquiry is instituted by the Board for one month after service of the notice. And, after the completion of such inquiry, if any person injured estimates the damage at a greater sum than the statutory amount, or the amount accepted by the Board, by way of compensation, such party may, subject to the limitations and restrictions there provided, bring an action for damages (ante, pp. 327–330). The owner of a cargo on board a ship

(*t*) *Pym* v. *Gt. North. Rail. Co.*, 31 Law J., Q. B. 249; 32 ib. 8 L. T. R., N. S. 734.

(*u*) 4 Instit. c. 22; 7 & 8 Vict. c. 2; 3 & 4 Vict. c. 65. *The Melvina*, 31 Law J., Adm. 113.

(*x*) 24 & 25 Vict. c. 10, s. 7.

(*y*) Ib. s. 35.

(*z*) *The Anne & Mary*, 2 W. Rob. 196; and see 23 Jur. part 2, 483.

(*a*) *Nelson* v. *Couch*, 2 N. R. 395.

(*b*) *The Milan*, 31 Law J., Adm. 105.

that has violated the statute, and so contributed to the injury, is not, as we have seen, prohibited thereby from recovering in the Court of Admiralty compensation against another ship which also by negligence contributed to the collision (ante, p. 329).

Parties to be made plaintiffs.—A person who has let chattels out to hire may, nevertheless, sue for damages in respect of a permanent injury to his reversionary interest. Thus, where the owner of a barge, who had let it out to hire to a bailee, brought an action for damages done to it, by reason of the negligence of a third party, it was held that he had a right to sue for the injury, notwithstanding the bailment (*c*).

Joint and separate rights of action.— When there are several joint-owners of a chattel which has been damaged or destroyed by negligence, all should be joined as plaintiffs; and if they are not so joined, the defendant may object to the non-joinder, in order that he may not be harassed by several actions for the same cause (*d*). Where two persons were owners of a ship in unequal proportions as tenants-in-common, Addison being the owner of a fourth part, and the plaintiff of the remaining three-fourths, and the former brought an action against the defendants, the owners of another ship, for wrongfully running down and injuring the vessel in which the plaintiff was interested, and the defendants omitted to plead the non-joinder of the other part-owner in abatement, and the plaintiff had judgment, and obtained full satisfaction for all the damage that he had sustained to his share of the ship, and afterwards the owner of the remaining three-fourths of the ship sued the defendants for the damage he had sustained, and the defendants pleaded the non-joinder of the other part-owner in abatement, and the plaintiff then set forth in his replication the proceedings in the former action, it was held that as the other part-owner had already received satisfaction, he could not be entitled to any part of the damages to be recovered in that action, and that he need not, consequently, be joined as a plaintiff (*e*).

Parties to be made defendants.—The party himself, who actually inflicts the injury through his own negligence, is of course always responsible for the injurious consequences of his default. "Those," observes Domat, "who construct works, or who do any other thing from whence may ensue damage to others, will be answerable for that damage, if they have not taken the necessary precautions to prevent it. Thus masons, carpenters, and others, who carry materials up their scaffolds, and those who, from the top of a tree, cut down the branches thereof, must give timely warning to all persons likely to be endangered by their proceedings, and will be answerable in damages if they neglect so to do (*f*); but as these parties

(*c*) *Mears* v. *Lond. & S. W. Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 220.
(*d*) Ante, pp. 54, 171; post, ch. 20.
(*e*) *Sedgworth* v. *Overend*, 7 T. R. 280. *Bloxam* v. *Hubbard*, 5 East, 420.
(*f*) Domat, liv. 2, tit. 8, s. 4.

are generally acting under the directions of some master and employer, and are unable themselves to make compensation in damages to the parties injured, the law properly holds the master and employer responsible for the act of his servant, whether the work is done by a domestic servant or day-labourer, or by a person who works by the job or piece, and contracts to do the work for a specific sum (*g*); provided always, that the workman is an ordinary labourer, personally engaged in the execution of the work, acting under the control of the master, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work (*h*).

If the person for whom the work is done selects the servant who is to do it, that will not relieve the master of such servant from liability for his negligence (*i*).

A servant who merely hires labourers for the performance of the master's work, is not answerable for the negligence of such fellow-servants, or for injuries inflicted by them in the course of their employment. Thus a gardener, or a steward, who employs labourers under him to do his master's work, is not answerable for the defaults or improper conduct of such labourers causing damage to a third party. In such cases the action must either be brought against the hand committing the injury, or against the owner for whom the act was done (*j*), or against both the one and the other jointly (*k*).

Where the lessee of a ferry hired of the defendants a steamer, with a crew, for the day, to carry his passengers, it was held that the defendants were liable for injuries caused to the passengers by the negligence of the crew, who were the servants of the defendants, although the passengers contracted with the lessee of the ferry for conveyance in the steamboat, and paid their fares to such lessee (*l*).

The liability of any one other than the party actually doing the act from whence the injury results, proceeds on the maxim *qui facit per alium facit per se*. The master has the selection of the servant employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer and master to the party by whose negligent act the injury has been occasioned (*m*).

(*g*) Ante, pp. 20-22. *Birket* v. *Whitehaven Junc. Rail. Co.*, 4 Exch. 137.

(*h*) *Sadler* v *Henlock*, 4 Ell. & Bl. 578; 24 Law J., Q. B. 138.

(*i*) *Holmes* v. *Onion*, 2 C. B., N. S. 790; 26 Law J., C. P. 263; ante, p. 20.

(*j*) *Stone* v. *Cartwright*, 6 T. R. 411.

(*k*) *Wilson* v. *Peto*, 6 Moore, 49.

(*l*) *Dalyell* v. *Tyrer*, El. Bl. & El. 899; 28 Law J., Q. B. 52.

(*m*) *Reedie* v. *Lond. & North-West. Rail. Co.*, 4 Exch. 255.

The master is not relieved from his responsibility for the wrongful act of his servant whilst doing his master's work, merely because an act of parliament has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge (*n*).

The general rule is, that the party injured by the negligence of another cannot go beyond the party who actually did the injury, unless he can establish that the latter stood in the relation of a servant to the defendant, or that the injury was the inevitable result of some specific order given by the defendant. There are two classes of cases: the first, where the act is done under the order of the employer, and the order cannot be obeyed without doing what is complained of; the second, where the improper mode of doing what might be rightly done occasions the mischief.

Endeavours have been made to hold all parties liable from whom the act ultimately originates; but it has been holden, that if the act ordered to be done can be lawfully done without injury to others, the act of the person personally engaged in doing the mischief is not the act of the person who set him in motion, unless the relationship of master and servant can be established between them (*o*).

Contractor and sub-contractor.—Although, therefore, a person has ordered or directed a particular thing to be done, yet if he does not employ his own servants and workmen to do it, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work, he is not responsible for injuries done to third parties from the negligent execution of the work (*p*), unless a nuisance is thereby created and continued on his own premises (ante, p. 169). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's show-room, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage (*q*). And where a company, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence, and the workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a

(*n*) *Martin* v. *Temperley*, 4 Q. B. 298.
(*o*) *Butler* v. *Hunter*, 7 H. & N. 826; 31 Law J., Exch. 214.
(*p*) *Cuthbertson* v. *Parsons*, 12 C. B. 304.
(*q*) *Milligan* v. *Wedge*, 4 Ad. & E. 737.

stone to fall upon him, it was held in an action against the company by the administratix of the deceased that they were not liable (*r*). But where the defendants, who were occupiers of a bonded warehouse in Liverpool, employed a master-porter for the purpose of removing some barrels of flour from their warehouse and lowering them into a cart, and the master-porter used his own tackle, and brought and paid his own men ; and, through the negligence of the men or the insufficiency of the tackle, one of the barrels slipped from the tackle whilst it was being lowered into the cart, and fell upon the plaintiff and injured him, it was held that the defendants were responsible for the injury (*s*). Here the work, it has been observed, was in effect done by the defendants themselves at their own warehouse, the workmen, though engaged by the master-porter, being under the control of the defendants, and acting substantially as their servants (*t*).

Negligence of servants working under builders' contractors and sub-contractors.— Where work which can lawfully be done without injury to others is placed in the hands of a builder or a contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it, exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the party responsible for injuries to strangers from the negligent execution of the work (*u*). If a person orders his wall or his house to be pulled down, he is not responsible for the negligence of the workmen employed by the builders for the purpose (*x*). And if the work is done under the immediate control and superintendence of a sub-contractor, then the latter is the party responsible for any wrong done by the workmen he employs in the execution of the work. It must not be understood, however, that a contractor cannot become liable for the negligence of his sub-contractor. If the contractor personally interferes and gives directions to the latter, or to the workmen employed by him, he would be responsible for the orders given, but he cannot be charged simply on the ground of his filling the character of contractor (*y*).

Where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and prepare and fix the necessary gas-fittings, and the builder made a sub-contract with a gas-fitter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion, which injured the butler

(*r*) *Reedie* v. *Lond. & N. W. Rail. Co.*, 4 Exch. 244.

(*s*) *Randleson* v. *Murray*, 8 Ad. & E. 109.

(*t*) Denman, C. J., 12 Ad. & E. 741; and see ante, pp. 169-170.

(*u*) *Steel* v. *S. E. R. Co.*, 16 C. B. 550. *Gray* v. *Pullen*, 11 W. R. 616.

(*x*) *Butler* v. *Hunter*, ante, p. 342.

(*y*) *Overton* v. *Freeman*, 11 C. B. 873; 21 Law J., C. P. 52. *Blake* v. *Thirst*, ante, p. 170.

of the club and his wife, it was held that the gas-fitter, and not the builder, was liable for the negligence (*z*).

Voluntary and involuntary trespasses — Direct and consequential injuries. — If a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib otherwise than in pure self-defence, are responsible, as we have seen, for the injury it occasions (*a*). "If A takes the hand of B, and with it strikes C, A is the trespasser and not B" (*b*).

"If," observes Lord Denman, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of school-boys, and one of these should playfully point the gun at a schoolfellow, and fire it off and maim him, the gamekeeper must answer in damages to the wounded party" (*c*). If a horse and cart are left standing in the street without any person to watch them, and a person strikes the horse and causes it to back against a shop-window, the owner is liable for the damages, for he must, as we have seen, take the risk of all the consequences that result from the horse being left unattended (*d*). In such a case the owner, who has left his cart unattended, and the person who struck the horse, are both liable for the injury (*d*).

"If I deliver my horse to a smith to shoe, and he delivers him to another smith, who pricks him, I may have an action on the case against the latter, though I did not deliver the horse to him. So, if I deliver goods to A, who delivers them to B, to keep to the use of A, and B wastes these goods, I may have an action on the case against B, though I did not deliver the goods to him" (*e*).

Joint and separate liabilities. — If several co-proprietors of a stage-coach intrust the driving of the coach to one of them, all will be responsible for injuries caused by his negligent driving (*f*). And if two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, the injured party has a remedy against the proprietor of either omnibus (*g*).

Declarations for injuries from negligence must set forth either an injury to the property or to the person of the plaintiff, or to both. If the injury

(*z*) *Rapson* v. *Cubitt*, 9 M. & W. 710.
(*a*) *Scott* v. *Shepherd*, 3 Wils. 403.
(*b*) *Gibbons* v. *Pepper*, 1 Ld. Raym. 38. Bac. Abr. TRESPASS, D. 2, ante, p. 5.
(*c*) *Lynch* v. *Nurdin*, 1 Q. B. 30.
(*d*) *Illidge* v. *Goodwin*, 5 C. & P. 192.
(*e*) Roll. Abr. 90. *Loeschman* v. *Machin*, 2 Stark. 311.
(*f*) *Moreton* v. *Hardern*, 4 B. & C. 223.
(*g*) Cresswell, J., 8 C. B. 121.

is an injury to goods and chattels, the declaration must allege them to be the goods and chattels of the plaintiff: for if there is no averment to this effect, and nothing on the record to show the plaintiff's right or title to the chattels or to the possession of them, there is no cause of action (*h*). The declaration for an injury to a ship or carriage through the negligent management of another ship or carriage by the defendant or his servants, should set forth the plaintiff's possession of his ship on the high seas or in a certain river, or of his carriage on a certain highway, and the defendant's possession of another ship on the high seas, or in the same river, or of another carriage on the same highway, and that the defendant navigated his ship or drove his carriage in so negligent a manner, that the defendant's ship or carriage, through his carelessness and mismanagement, ran foul of the plaintiff's ship or carriage, and injured the same, and spoiled divers goods and chattels in the said ship, and caused the plaintiff to incur great expenses in repairing, &c., and caused the plaintiff to be deprived of the use of his ship, &c., and to lose the profits of a voyage, concluding with a claim of damages (*i*).

If the plaintiff complains of an injury to the person, the declaration will either be for an immediate injury, such as an assault (post, ch. 15) or trespass, or a consequential injury, such as the breaking of the plaintiff's leg through the upsetting of a coach negligently driven by the defendant (*k*), or the loss of the plaintiff's eye through the negligence of the defendant in intrusting a loaded gun to the care of a young and inexperienced person, who carelessly shot off the gun pointed at the plaintiff (*l*). If the cause of action be a breach of duty, arising *ex contractu*, the circumstances and the nature of the contract or employment creating the duty must be truly set forth on the face of the declaration, and be supported by the evidence at the trial (*m*).

A declaration alleging that the plaintiff was the servant of the defendant, and that the defendant ordered the plaintiff to ascend and use certain scaffolding, &c., well knowing it to be dangerous and unfit for use, and that the plaintiff, in obedience to the order of the defendant, used the scaffolding, &c., believing it to be safe and fit for use, and not knowing the contrary, and not having the same means that the plaintiff had of forming a correct opinion upon its sufficiency and safety, and that the scaffolding, &c., by reason of its being unsafe and unfit for use, gave way with the plaintiff upon it, and precipitated the plaintiff upon the ground, &c., discloses a good cause of action (*n*).

If the plaintiff complains of injuries received by the upsetting of

(*h*) *Pritchard* v. *Long*, 9 M. & W. 666. *Forman* v. *Dawes*, Car. & M. 120.

(*i*) *Leame* v. *Bray*, 3 East, 593.

(*k*) *Curtis* v. *Drinkwater*, 2 B. & Ad. 169.

(*l*) *Dixon* v. *Bell*, 5 M. & S. 198.

(*m*) *Lopes* v. *De Tastet*, 4 Moore, 279; ante, p. 12.

(*n*) *Williams* v. *Clough*, 3 H. & N. 258; 27 Law J., Exch. 325.

a coach in which he was riding as a passenger, the declaration should allege that the defendant was the proprietor of a stage-coach, and that the plaintiff was received by him as a passenger, to be carried safely for hire, and that the defendant did not take proper care in the driving and management of the coach, but suffered the coach to be overloaded, &c., stating the facts constituting the act of negligence, and the injury resulting to the plaintiff, and claiming damages.

The allegation in the declaration that the plaintiff was to be safely carried, does not mean that he is to be conveyed safely absolutely, like a bale of goods, but that he is to be carried with due care (*o*).

Plea of not guilty.—The plea of not guilty in actions for injuries, caused by the negligence of the defendant, operates as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration (*p*). If the plaintiff complains of damage done to his goods and chattels, or personal property, through the negligence of the defendant or his servants, the plea of not guilty operates as a denial only of the defendant's having committed the wrong alleged by damaging the goods mentioned, but not of the plaintiff's property therein (*q*). The defendant cannot, therefore, under the plea of not guilty, show that the damaged chattel did not belong to the plaintiff, or that it was not in his possession at the time of the injury (*r*). But where the plaintiff's own negligence is the immediate cause of the injury, or has contributed to the mischief of which he complains, the defence is admissible under the plea of not guilty (*s*). And if the injury was the result of an inevitable accident, and was not occasioned by any default on the part of the defendant, the defendant will be entitled to a verdict under a plea of not guilty. This has been held to be the case where a horse, being frightened by a clap of thunder, ran away with the defendant, and knocked down the plaintiff (*t*); also, where a horse, being frightened by the noisy and rapid approach of a butcher's cart, furiously driven, became ungovernable, and ran against and killed another horse, notwithstanding all the efforts of the defendant to control the animal (*u*). But where an action was brought against the defendant for running over the plaintiff with a horse and cart, and breaking his leg, it was held that the defendant could not, under a plea of not guilty, show that there was no negligence on his part, but that the plaintiff accidentally slipped from the pavement at the moment

(*o*) *Harris* v. *Costar*, 1 C. & P. 636. *Aston* v. *Heaven*, 2 Esp. 535.

(*p*) Reg. Gen. Hil. Term. 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.; post, ch. 21.

(*q*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.

(*r*) *Hart* v. *Crowley*, 12 Ad. & E. 378. *Taverner* v. *Little*, 5 Bing. N. C. 678.

(*s*) *Bridge* v. *Grand Junc. Rail. Co.*, 3 M. & W. 244. *Holden* v. *Liv. Gas Co.*, 3 C. B. 1; 15 Law J., C. P. 301.

(*t*) *Gibbon* v. *Pepper*, 2 Salk. 638; Ld. Raym. 38.

(*u*) *Wakeman* v. *Robinson*, 1 Bing. 213.

when the cart was passing, and had so got his leg under the wheel. "The authorities show," observes Lord Denman, "that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been pleaded under the general issue; but a defence admitting that the injury resulted from an act of the defendant is not so proveable" (*x*).

Evidence at the trial—Proof of negligence.—Proof of the commission by the defendant, or his servants, of the injury of which the plaintiff complains, very generally carries with it *primâ facie* proof of negligence, and it is for the defendant to show that the injury was the result of inevitable accident (ante, pp. 2, 222, 320), or that it was occasioned by the negligence or misconduct of the plaintiff himself (ante, pp. 16–18), or by circumstances over which the defendant had no control (ante, pp. 321, 322). Where the declaration of the cause of action stated that the defendant struck the plaintiff's cow divers blows, by reason whereof she died, it was held that it was sufficient to prove that the cow received such injury at the hands of the defendant, that it became necessary to kill her (*y*).

Where an act of parliament directed a water-company to lay down pipes, with plugs in them, as safety-valves to prevent the bursting of the pipes, and the plugs were properly made, and of proper material, and a severe frost came and prevented the plugs from acting, and the pipes burst and flooded the plaintiff's cellar, it was held that there was no evidence of negligence against the company (*z*).

A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, or with having so negligently kept his fire that it spread to and consumed the plaintiff's corn, is supported by proof that the defendant's servant negligently drove the cart, or lighted and kept the fire (*a*) (ante, pp. 20–22, 208, 324). But in order to make the master responsible, it is not sufficient to show that the servant has been guilty of negligence in driving, it must be shown that the servant was driving at the time with the authority of the master on his business; but it is not necessary to prove any express request or order by the master to the servant to use the master's horse or carriage. If, at the time of the injury, the servant appears to have been driving his master's carriage in the ordinary course of his employment, the master will be *primâ facie* responsible (*b*).

If the action is brought under the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accident (ante, p. 338), it

(*x*) *Hall* v. *Fearnley*, 3 Q. B. 921.
(*y*) *Hancock* v. *Southall*, 4 D. & R. 202.
(*z*) *Blyth* v. *Birmingham Water Co.*, 11 Exch. 781.
(*a*) *Brucker* v. *Fromont*, 6 T. R. 659. *Turberville* v. *Stampe*, 1 Ld. Raym. 264. *Croft* v. *Alison*, 4 B. & Ald. 590.
(*b*) *Patten* v. *Rea*, 2 C. B., N. S. 613; 26 Law J., C. P. 237.

must be proved that actual pecuniary damage has been sustained by the relatives of the deceased person, and that the plaintiff, who sues as administrator, or the person for whose benefit the action is brought, had some pecuniary interest in the life of the person killed. It was intended by the act to give compensation for damage actually sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence, by making them pay costs; but the loss of anticipated benefit, founded on a reasonable and just expectation of pecuniary advantage derivable from the continuance of the life of the deceased, may be the subject-matter of damage, and a sufficient foundation for an action (*c*).

If the plaintiff complains of a breach of duty on the part of the defendant, in his character of an attorney, it must be clearly shown that it was the duty of the defendant to do that which he is charged with having neglected. If the matter is at all left in doubt, he is clearly entitled to the benefit of the doubt (*d*).

Proof of the ownership of chattels damaged by negligence.—Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses, it was held that they were properly described as owners and proprietors of the carriage in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot (*e*).

Evidence for the defence — Questions for the jury.—If it appears that there was negligence on the part of the plaintiff as well as on the part of the defendant, the proper question for the jury is, "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, that, but for such negligence on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not" (*f*).

In an action for damage resulting from the negligent driving of the defendant's servant, the proper question for the jury is, whether at the time of the commission of the injury the servant was driving on his master's business and with his authority (*g*).

In actions against an attorney for negligence, it is the province of the judge to inform the jury for what species or degree of negligence an attorney is properly answerable, and what duty is cast upon him by law, or by the practice of the court in the particular instance, and leave them to say whether the attorney has performed his duty; and in case of non-

(*c*) *Duckworth* v. *Johnson*, 4 H. & N. 659.

(*d*) *Chapman* v. *Van Toll*, 8 Ell. & Bl. 396; 27 Law J., Q. B. 1; ante, pp. 335–338.

(*e*) *Croft* v. *Alison*, 4 B. & Ald. 590.

(*f*) *Tuff* v. *Warman*, 2 C. B., N. S. 740; 27 Law J., C. P. 322; ante, pp. 16–18.

(*g*) *Patten* v. *Rea*, 2 C. B., N. S. 606; 26 Law J., C. P. 235.

performance, whether the neglect was of that sort or degree which is venial or culpable in the sense of sustaining or not sustaining an action (*h*).

Where the injury complained of has resulted from negligence in leaving instruments of danger, such as a horse and cart unattended in a public thoroughfare or place of public resort, it is for a jury to inquire whether the horse was vicious or steady, whether the horse was left for an unreasonable time, and whether there was any excuse for leaving it at all unattended, whether assistance could have been procured to watch the horse, whether the street was unfrequented or thronged, and especially whether large numbers of young children might reasonably be expected to be about the spot (*i*).

The damages recoverable will mainly depend upon the nature and character of the injury, whether it is the mere result of such negligence as amounts to little more than accident, or whether it is of a wilful or insolent character (*k*). In cases of injuries to chattels from negligence, the measure of damages is the actual deterioration in the value of the chattel, and if the owner has been deprived of the use of the chattel, and has been obliged to hire another chattel, and been put to expense, and has sustained special damage, which is the natural and necessary result of the wrongful act, such damages are recoverable if claimed in the plaintiff's declaration. In an action for an injury to a horse from negligent driving, it was held that the proper measure of damages was the keep of the horse at a farrier's, the amount of the farrier's bill, and the difference between the value of the horse at the time of the accident and at the time of the commencement of the action (*l*).

Negligent navigation of vessels.—The liability of a shipowner for damage done by the negligent management of his vessel, causing a collision with another vessel, is, as we have seen, limited to the value of his vessel and freight at the time of such collision: and if the vessel instantly founders, he is not thereby exempted from liability (*m*). The value is to be taken at the moment of collision (*n*). Where the plaintiff, in consequence of the collision, has been obliged to avail himself of the assistance of persons who demand an exorbitant sum for salvage, and it is reasonable and prudent to resist this demand, and costs are incurred in resisting it, the plaintiff will be entitled to recover these costs, if he claims them in his declaration as part of the damages (*o*). The proceeding in the Court of Admiralty in cases of collision is, as we have seen, against the ship (ante, p. 329); and where both vessels are found to blame, and

(*h*) *Hunter* v. *Caldwell*, 10 Q. B. 82; 12 Jur. 285. *Hatch* v. *Lewis*, 1 F. & F. 467.
(*i*) *Lynch* v. *Nurdin*, 1 Q. B. 38.
(*k*) *Emblem* v. *Myers*, 6 H. & N. 54.
(*l*) *Hughes* v. *Quentin*, 8 C. & P. 703.
(*m*) *Brown* v. *Wilkinson*, 15 M. & W. 391.
(*n*) *The Mary Caroline*, 12 Jur. 945.
(*o*) *Tindall* v. *Bell*, 11 M. & W. 228.

the Merchant Shipping Act does not preclude the recovery of damages (ante, p. 328), the shipowners can only recover a moiety of the damage which they have respectively sustained; and the same rule applies to actions by the owners of the cargoes on board the delinquent ships (*p*).

Damages when the plaintiff is insured against loss, or has received full indemnity under a contract of insurance.—The recovery of full compensation for loss or damage to property under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrong-doer who has done the mischief. The plaintiff's contract with the underwriters or insurers is *res inter alios acta*, of which the defendant who is sued for negligence cannot avail himself. If it were not so, the wrong-doer would take the benefit of a policy of insurance without paying the premium (*q*). A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrong-doer, is not entitled to a double satisfaction, but is bound to hand over the damages to the insurer or underwriter, who is the party really damnified by the wrongful act (*r*).

Damages recoverable by personal representatives in cases of death from negligence.—In all actions by the personal representatives of persons killed by negligence, brought under the stat. 9 & 10 Vict. c. 93 (ante, p. 339), to recover damages proportioned to the injury resulting from his death to the persons for whose benefit the action is brought, the jury, in assessing the damages, must confine themselves to injuries of which a pecuniary estimate may be made, and cannot lawfully increase them by adding a solatium to those parties in respect of the mental sufferings occasioned by such death. They cannot, therefore, lawfully inquire into the degree of mental anguish which each member of the family has suffered from the bereavement, and cannot take into consideration the mental sufferings of a widow or child for the loss of a husband or a parent (*s*). It is clear, also, that the damages are not to be given merely in reference to the loss of any legal right against the deceased, which might have been turned to profit if he had lived, and which has been lost by his death, for the damages recovered are to be distributed amongst the relations only, and not to all individuals sustaining loss; and, accordingly, the practice has been to ascertain what benefit could have been claimed from the deceased, if he had lived, by the party seeking to obtain damages; and if he can show that he had a reasonable expectation of pecuniary benefit from the continuance of the life, and is within the requisite degree of relationship, his claim may fairly be considered by the jury in assessing

(*p*) *The Milan*, ante, p. 329.
(*q*) *Yates* v. *Whyte*, 4 Bing. N. C. 283.
(*r*) Ante, p. 211; and post, ch. 22.
(*s*) *Blake* v. *Mid. Rail. Co.*, 21 Law J., Q. B. 233; 18 Q. B. 93. *Armsworth* v. *S. E. R. Co.*, 11 Jur. 759.

the amount of damages (*t*). Thus the loss of the benefit of education and of the comforts and conveniences of life, and of an expected pecuniary provision, may, as we have seen, be taken into consideration; and it is for a jury to say, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages (*u*). No damages can be given in respect of funeral expenses and mourning, there being no language in the statute referring to these expenses and rendering them recoverable (*v*).

(*t*) *Franklin* v. *S. E. Rail. Co.*, 3 H. & N. 214; 4 Jur. N. S. 565.

(*u*) *Pym* v. *Gt. North. Rail. Co.*, ante, p. 339.

(*v*) *Dalton* v. *S. E. R. Co.*, 4 C. B., N. S. 296; 27 Law J., C. P. 227.

CHAPTER IX.

OF NEGLIGENCE ON THE PART OF BAILORS AND BAILEES—DETENTION AND LOSS OF CHATTELS BY BAILEES (x).

SECTION I.— *Of negligence on the part of bailors and bailees.*—Bailments of chattels—Negligence of bailees—Loss of chattels by workmen to whom they have been delivered—Negligent keeping of goods by warehousemen, wharfingers, &c.—Losses by robbery and theft—Losses occasioned by the negligence of the bailor—Loss of cattle—Liabilities of agisters of cattle—Deposit of goods under a special contract—Deposit of luggage and parcels at railway stations—Delay in delivery—Loss of goods by persons who have received them to be carried, but who are not common carriers—Limitation of the liability of shipowners in respect of the carriage of merchandise and chattels—Detention of chattels by bailees claiming lien—Particular liens and general liens—Ordinary lien of workmen and artificers—Parties against whom a lien may be claimed—General lien—Lien of factors, brokers, bankers, attornies, solicitors, &c.—Lien for freight—Lien of consignees—Notice that goods will be held subject to general lien—Custom of trade—Extinguishment of liens—Detention of chattels by one of several joint-owners or tenants-in-common—Redelivery of chattels to one of several bailors.

SECTION II.—*Of actions for the negligent management, negligent keeping, and unlawful detaining of goods and chattels.*—Parties to be made plaintiffs—Joint and separate rights of action—Power of bailees to compel rival claimants to interplead and establish their title—Declarations against bailees for negligence and breach of duty—Payment of money into court—Pleadings, defences, evidence, and damages recoverable—Orders for the delivery of the specific thing detained—Assessment of the value thereof—Assessment of damages where all or part of the things detained have been delivered up after action.

SECTION I.

OF NEGLIGENCE ON THE PART OF BAILORS AND BAILEES—DETENTION AND LOSS OF CHATTELS BY BAILEES.

Of bailments of chattels.—"There are," observes Holt, C. J., "six sorts of bailments. The first is a bare, naked bailment of goods delivered by one man to another, to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in

(x) And see further, as to bailments, Addison on Contracts, ch. 12, 5th ed.

Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend, gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee, to be used by him for hire; this is called *locatio et conductio*, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called, in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage" (*y*).

Negligence of bailors.—It is the duty of every bailor of dangerous, explosive, and combustible substances, knowing the dangerous nature of them, to take care that the danger is communicated to a bailee to whom they are delivered to carry, to take care of, or to keep; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant (*z*).

Of the negligent keeping of chattels by bailees.—"As to the first sort of bailment," observes Holt, C. J., "where a man takes goods into his custody, to keep for the use of the bailor, such a bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross neglect. If he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty" (*a*). But if he is guilty of gross negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor (*b*).

"As to the second sort of bailment—viz. *commodatum*, or lending gratis—the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, he will be answerable if he be guilty of the least neglect: as if a man should lend another a horse to go in one direction, or for one month, and the bailee goes in another direction, or keeps the horse above a month, and an accident happen to the horse, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, that if the horse had been used no otherwise than as he was lent, that

(*y*) *Coggs* v. *Bernard*, 1 Smith's L. C. 152.

(*z*) *Farrant* v. *Barnes*, ante, p. 15.

(*a*) Holt, C. J., *Coggs* v. *Bernard*, Ld. Raym. 909; 1 Smith's L. C. 147. *Walker* v. *Guar. Assoc.*, 18 Q. B. 286; 21 Law J., Q. B. 257.

(*b*) *Doorman* v. *Jenkins*, 2 Ad. & E. 258.

accident would not have befallen him. If the bailee put the horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or the stable-doors open, and thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist" (*c*).

"The duties of the borrower and lender," observes Coleridge, J., "are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which, directly, the borrower is injured. 'Adjuvari quippe nos, non decipi, beneficio oportet,' is the maxim which Story borrows from the 'Digest;' and Pothier is express to the same effect, citing, as Story does also, the instance, 'Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est.' This is so consonant to reason and justice that it has become part of our law. If, therefore, the owner of a horse, knowing it to be vicious and unmanageable, and highly dangerous to ride, should lend it to one who is ignorant of its bad qualities, and conceals them from him, and the rider, using ordinary care and skill, is thrown and injured, the lender would be responsible. By the necessarily implied purpose of the loan, a duty is contracted by the lender towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous to him" (*d*). In the absence of all proof of knowledge by the lender of the defect which caused the injury, there would of course be no cause of action against him (*e*).

"As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of hiring is expired; for when goods are let out for reward, the hirer is bound to use such care as the most diligent father of a family uses, and if he uses that he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable if the goods be stolen" (*f*).

(*c*) *Coggs* v. *Bernard*, Ld. Raym. 911.

(*d*) *Blakemore* v. *Brist. & Exeter Rail. Co.*, 8 Ell. & Bl. 1051; 27 Law J., Q. B. 167. *Cowley* v. *Mayor, &c. of Sunderland*, 6 H. & N. 565; 30 Law J., Exch. 127.

(*e*) *MacCarthy* v. *Young*, 6 H. & N. 329; 30 Law J., Exch. 227.

(*f*) Ld. Holt, *Coggs* v. *Bernard*, Ld. Raym. 909.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servant and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground, and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postillion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (*g*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden. If it is hired to go to Richmond, he has no right to go with it to York; and if, during such misuser, a loss occurs, the hirer will be responsible therefor.

If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss (*h*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its feed, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner (*i*).

"As to the fourth sort of bailment, viz. *vadium*, or a pawn, if the pawn be such as will be the worse for using, the pawnee cannot use it as clothes, &c.; but if it be such as will be never the worse, as jewels pawned to a lady, she might use them; but then she must do it at her peril: for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the

(*g*) Jones, Bailm. 88. Pothier, LOUAGE, No. 106, 190; Tr. des Oblig. 1, 543.
(*h*) *Deane* v. *Keate*, 3 Campb. 4.
(*i*) *Handford* v. *Palmer*, 5 Moore, 79; 2 B. & B. 359. *Bray* v. *Mayne*, 1 Gow. N. P. C. 1.

nature of a deposit, and is not liable to be used. But if the pawn be of such a nature that the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. And as to neglects for which the pawnee shall make satisfaction, Bracton tells us that if a creditor takes a pawn he is bound to restore it upon payment of the debt; but yet, if the pawnee uses true diligence in keeping of the pawn, it is sufficient, and, notwithstanding the loss of it, he may resort to the pawnor for his debt. And the true reason of all these cases is, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods (*k*). But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrong-doer; and a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. The same law holds in relation to goods found."

"As to the fifth sort of bailment, viz. a delivery to carry, or otherwise manage, for a reward, to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. (post, ch. 10). The second sort are bailees, factors, and such-like; and though a bailee is to have a reward for his management, yet he is only to do the best he can, and if he be robbed, &c. it is a good account."

"As to the sixth sort of bailment, it is to be taken that the bailee is to have no reward for his pains, and that by his ill-management the goods are spoiled. Then the bailee, having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, the bailee is answerable. It is an obligation which arises *ex mandato*. It is what we call in English, acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable; and the reasons are, first, because in such a case a neglect is a deceit to the bailor, for when he intrusts the bailee, upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of such a trust, undertaken voluntarily, will be a good ground for an action. A strong case to this matter was an action against a man who

(*k*) *Healing* v. *Cathrell*, 25 Law T. R. 7.

had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given: because, when the party has taken upon him to keep the sheep, and after suffers them to perish by his default, inasmuch as he has taken them, and has them in his custody, if after he does not look to them, an action lies. And if a man will enter upon the thing, and take the trust upon himself, and miscarries in the performance of the trust, an action will lie against him for that; though nobody could have compelled him to do the thing" (*l*).

Where a bystander was asked by the owner of a horse to get on the horse and ride it, for the purpose of showing it off for sale, and the bystander recklessly and carelessly rode the horse over very slippery and dangerous ground, and threw it down and injured it, it was held that he was responsible for the injury (*m*).

Loss of chattels by workmen.—Every bailee for hire of a chattel is bound to take the same care of the chattel, whilst it remains in his possession, that a prudent and cautious man ordinarily takes of his own property. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the damage, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual and unexpected visitation from such vermin. The very occurrence of the disaster affords a strong *primâ facie* presumption of a want of ordinary caution (*n*). Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and dashed the bailor's vessel against another vessel; it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident (*o*). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him (*p*).

Theft by servants.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest

(*l*) *Coggs* v. *Bernard*, Ld. Raym. 909; 1 Smith's L. C. 161. *Doorman* v. *Jenkins*, 2 Ad. & E. 262.

(*m*) *Wilson* v. *Brett*, 11 M. & W. 113.

(*n*) In the Roman law proof of such a disaster was held to be proof of negligence. "Si fullo vestimenta polienda acceperit; eaque mures roserint, ex loçato tenebitur quia debuit ab hac re cavere. . . . . Poterat ea res in locum tutiorum transferre."—Dig. lib. 19, tit. 2, lex. 13, s. 5.

(*o*) *Leck* v. *Maestaer*, 1 Campb. 137.

(*p*) Ld. Campbell, *Dansey* v. *Richardson*, 3 Ell. & Bl. 169; 23 Law J., Q. B. 228.

vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence (*q*). Where a chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited, but the watches in the iron chest remained untouched; it was held, that as the watchmaker had taken more care of his own watches, by locking them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C. J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house" (*r*).

Negligent keeping of goods by warehousemen, wharfingers, and depositaries for hire.—All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labour and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation, which the most prudent and careful of men exercise for the protection of their own property (*s*). If the goods are greatly injured by mice or rats, the warehouseman will be responsible for the damage (*t*), although he keeps cats to destroy vermin (*u*). It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it (*x*); the mere fact of the loss is *primâ facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing intrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner (*y*).

Distinction between robbery and theft.—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and rifled of its contents, and a theft

(*q*) *Walker* v. *British Guar. Ass.*, 21 Law J., Q. B. 260; 18 Q. B. 277.

(*r*) *Clarke* v. *Earnshaw*, Gow. 30.

(*s*) "Quod si horrearius nominatim custodiam mercium in se recepit, videbitur locasse operas non solum exactæ, sed etiam *exactissimæ* custodiæ."—Pandect. Just. ed. Poth. lib. 19, tit. 2, art. 3, 72.

(*t*) *White* v. *Humphrey*, 11 Q. B. 44.

(*u*) *Laveroni* v. *Drury*, 8 Exch. 166; 16 Jur. 1024.

(*x*) *Cairns* v. *Robins*, 8 M. & W. 258. *Reeve* v. *Palmer*, 5 C. B., N. S. 84. *Goodman* v. *Boycot*, 2 B. & S. 1; 31 Law J., Q. B. 69.

(*y*) *Dover* v. *Mills*, 5 C. & P. 175.

or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery (*z*) (it being considered that individual care or vigilance could avail but little against the open attack of the determined robber); in the other, he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety (*a*). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of the articles as he had taken of his own property, he was not responsible for the theft committed by his servant (*b*), but every depositary of chattels to be kept for hire is *primâ facie* responsible for a theft committed by his own servants within the house (*c*), and can only discharge himself from liability by showing that the theft was committed under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it, or prevented it.

Losses occasioned by the negligence of the bailor.—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off, for the purpose of showing the ginseng to expected purchasers, who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng; it was held that the defendant, the warehouseman, was not responsible for the loss (*d*).

Loss of chattels by wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods intrusted to him, to be dealt with in the way of his trade, are analogous to those of the

(*z*) Dig. lib. 17, tit. 2, lex. 52, 53. Instit. lib. 3, tit. 15, s. 2, 3.

(*a*) "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpâ conjuncti esse solent; cujusmodi sunt *furta*. Quamobrem, qui rem *furto* amissam dicit, *is diligentiam suam probare debet*." Vin. Com. ad Instit. lib. 3, tit. 15, s. 5. Pothier (Pret a Usage), art. 53. Abbott, C. J., Ry. & Mood. 276.

(*b*) *Finucane* v. *Small*, 1 Esp. 315.

(*c*) *Hodgson* v. *Fullarton*, 4 Taunt. 787. Dallas, C. J., Gow. 32. Campbell, C. J., & Coleridge, J., 3 Ell. & Bl. 156–171; 23 Law J., Q. B. 223–229. *De Rothschild* v. *Royal Mail, &c. Co.*, 7 Exch. 734; 21 Law J., Exch. 273.

(*d*) *Cailiff* v. *Danvers*, 1 Peake, N. P. C. 155; ante, pp. 16–18.

warehouseman. If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel (*e*). If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the masters and officers of such vessel, although they are not actually removed from the wharf (*f*).

Loss of cattle — Liabilities of agisters of cattle. — A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been averted and prevented by the exercise of great care and vigilance. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear that the horse had strayed through any defect in the fences, or through any of the gates having been left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse (*g*). If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal, by reason thereof is lost or injured, this is a degree of neglect for which he is undoubtedly responsible (*h*).

Deposit of luggage and parcels at railway stations — Delay in delivery. — If the ticket or receipt given on the deposit of goods at the station of a railway company does not state that the goods will not be delivered back on a Sunday, or specify the times at which parcels are deliverable, it is the duty of the company to be always ready to deliver them within a reasonable time after demand (*i*).

Deposit of goods under a special contract. — In a contract of bailment, the bailee may impose any fair and reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept, and his re-

(*e*) *Leigh* v. *Smith*, 1 C. & P. 638, 641; 2 Esp. 695.

(*f*) *Cobban* v. *Downe*, 5 Esp. 41; Story's Bailments, 293; Sir Wm. Jones, 97.

(*g*) *Broadwater* v. *Blot*, Holt, 547.

(*h*) *Mosley* v. *Fosset*, 1 Roll. Abr. 4; ante, pp. 129, 130, 140.

(*i*) *Stallard* v. *Gt. West. Rail. Co.*, 2 B. & S. 419; 31 Law J., Q. B. 137.

sponsibility for the redelivery of them dependent, upon those terms being assented to and observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly repugnant to, and inconsistent with, any contract at all (*k*). Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable and fair, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct (*l*).

Deposit of luggage and parcels at railway stations.—Where a railway company provided a place of deposit for the reception of articles and luggage for the convenience of passengers on payment of a trifling charge, and gave public notice that they would not be responsible for any package exceeding the value of 10*l.*, and the plaintiff deposited a leathern bag containing jewellery and articles exceeding 10*l.* in value, and received a ticket in exchange, on the back of which the terms of the deposit were printed, and the bag was delivered by mistake to a wrong person, but was ultimately recovered and returned to the plaintiff by the company, with a portion of the jewellery missing, it was held that the company was not responsible for the loss (*m*).

Loss of goods by parties receiving them to be carried, but who are not common carriers.—"Every man, observes Gould, J., "that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage; and if a reward be given, then it is without question so. The reason of the action is the particular trust reposed in the bailee, to which he has concurred by the assumption of the work, and in the executing which he has miscarried by his neglect. And when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms" (*n*). The law casts upon him the obligation of using due and proper care and skill, whether any hire or reward has or has not been agreed to be paid. If, therefore, a person receives a free pass, and is carried gratuitously upon a railway, the railway company is not thereby released from the duty of using due and proper care in the performance of the work of carrying him.

When a bailee has undertaken to carry money, or goods and chattels, gratuitously to a distant part, it is no answer to an action brought against

(*k*) Addison on Contracts, pp. 1038, 1039, 5th ed.

(*l*) Byles, J., *Van Toll* v. *S. E. R. Co.*, 12 C. B., N. S. 75; 31 Law J., C. P. 245. *Peek* v. *North Staff. Rail. Co.*, 8 L. T. R., N. S. 770.

(*m*) *Van Toll* v. *S. E. R. Co.*, ut sup.; ante, pp. 16–18.

(*n*) *Coggs* v. *Bernard*, Ld. Raym. 909; 1 Smith's L. C. 148.

him for the breach of his engagement to say that he lost the articles in a brothel or a lodging-house, or by the way-side, without giving any satisfactory or excusable account of the loss. The loss itself unexplained affords the strongest presumption of negligence (*o*), and the bailee must rebut this presumption by showing that he was forcibly robbed, or that the property was stolen without any gross neglect or wilful default on his part (*p*), or that his vehicle broke down or was overturned, and that the articles were lost during the hurry and confusion and fright of an undoubted accident. Where the bailee of a parcel upon which the word "value" was written promised to carry it gratuitously from Bedford to London, and directions were given to him to take particular care of it upon the road, and deliver it to the book-keeper at the Bell and Crown, Holborn, and the parcel not being delivered, an action was brought against the bailee for the breach of his engagement, and no satisfactory evidence was offered by him to excuse or account for his neglect, it was held that the bailee was responsible for the value of the parcel (*q*).

Where the captain of a vessel was intrusted with a seaman's chest to be carried gratuitously from Trinidad to England, and during the voyage the chest was opened to see if it contained any contraband articles, and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvas bag, and deposited in the captain's own chest in his cabin, where his own money and valuables were kept, and on the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered, and it appeared that the night preceding the loss of the chest an excise officer and two young men belonging to the ship had been allowed to sleep in the captain's cabin, Lord Ellenborough left it to the jury to say whether the captain had been guilty of negligence, telling them that as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence, and the jury being of the opinion that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property (*r*).

When the bailee is to be paid for carrying the things, he cannot, of course, in any case, set up a mere loss of goods by the way, as an answer to an action for the non-delivery of them (*s*). But the duty to carry safely, which the law imposes upon all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safe at all events, but that they shall be kept safe

(*o*) *Parry* v. *Roberts*, 3 Ad. & E. 120; 5 N. & M. 670; Maule, J., 6 C. B. 456.

(*p*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; Holt, C. J., 2 Raym, 913.

(*q*) *Beauchamp* v. *Powley*, 1 M. & Rob. 38.

(*r*) *Nelson* v. *Mackintosh*, 1 Stark. 237.

(*s*) *Rogers* v. *Head*, Cro. Jac. 262. *Matthews* v. *Hopping*, 1 Keb. 852. *Ross* v. *Hill*, 2 C. B. 877; 15 Law J., C. P. 182.

from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance and skill.

Where the defendant received eleven boxes of gold dust, to be carried and delivered at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract (*t*). If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not, of course, responsible for the loss (*u*). But if the goods are actually bailed or delivered into the hands of the carrier, the latter cannot exonerate himself from the consequences of negligent keeping by showing that the owner sent his own servant with the goods for greater security (*x*).

Limitation of liability of shipowners.—The Merchant Shipping Acts (17 & 18 Vict. c. 104, part ix.), s. 503, and 25 & 26 Vict. c. 63, s. 54, exempt the owners and shareholders of sea-going ships from liability to make good any loss or damage that may happen, without their actual fault or privity, to any goods, merchandise, or things from FIRE on board ship, or to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of robbery or embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles.

Detention of chattels by bailees under a claim of lien.—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand upon or in respect of them has been satisfied by the bailor. A right of lien may exist in favour of the unpaid vendor of chattels, who has not parted with the possession of the things he has sold; or in favour of parties who have advanced money upon the security of a deposit of title-deeds, or of goods and chattels; of innkeepers who have provided lodging and food for travellers and guests (*y*); of common carriers who have received goods to be carried for hire; of shipowners who have earned freight for the conveyance of a cargo, or the hire of their vessels under a charter-party of affreightment, when the ship itself has not been demised to the charterer, or who have a claim against the owners of goods for general average or salvage (*z*); of the salvor or rescuer of property from perils of the

(*t*) *De Rothschild* v. *R. M. St. P. Co.*, 7 Exch. 734; 21 Law J., Ex. 273.

(*u*) *Brind* v. *Dale*, 8 C. & P. 200, 211; 2 M. & Rob. 80.

(*x*) *Robinson* v. *Dunmore*, 2 B. & P. 416.

(*y*) *Allen* v. *Smith*, 31 Law J., C. P. 306.

(*z*) *Briggs* v. *Mercht. Trad. &c.*, 13 Q. B. 167; 18 Law J., Q. B. 178.

sea, who has earned salvage for his services; of the factor, broker, or auctioneer, who has received goods for sale, and has made advances or given acceptances upon the credit of them to his employer, or who has sold them and earned commission, &c., and retains in his hands the produce of the sale. It generally exists, also, in favour of artisans and others who have bestowed labour and service on goods and chattels which have been delivered to them to be repaired, improved, or mended. It may exist also in many other cases by custom, or by the express agreement of the parties (*a*).

The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of a debt secured by the lien being barred by the statute of limitations (*b*).

Particular liens and general liens.—There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour and money expended upon them, and those liens are favoured in law. General liens are claimed in respect of a general balance of accounts, and these are founded in custom only, and are therefore to be taken strictly.

Ordinary lien of workmen and artificers.—Whenever a party has bestowed work and labour or skill in repairing or improving a chattel at the request, or by the employment, of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement (*c*). Thus the artificer to whom goods are delivered to be worked up in form for hire, the shipwright to whom a vessel has been delivered to be repaired (*d*), the printer to whom paper has been delivered to be printed (*e*), the miller who has ground corn or meal at his mill (*f*), the horsebreaker or trainer by whose skill a horse is trained and rendered manageable (*g*), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve or increase its value, or carry it from one place to another for hire, no lien attaches upon it. Thus, if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. When a mortgage-deed was delivered to an auctioneer in order that he might obtain payment of the principal

(*a*) *Small* v. *Moates*, 9 Bing. 574. *Norris* v. *Williams*, 1 Cr. & M. 842. *Hague* v. *Dandeson*, 17 Law J., Exch. 269.

(*b*) *Speurs* v. *Hartly*, 3 Esp. 81. *Re Broomhead*, 16 Law J., Q. B. 355.

(*c*) *Chase* v. *Westmore*, 5 M. & S. 183.

(*d*) *Franklin* v. *Hosier*, 4 B. & Ald. 341. *Williams* v. *Allsup*, 10 C. B., N. S. 417; 30 Law J., C. P. 353.

(*e*) *Blake* v. *Nicholson*, 3 M. & S. 107.

(*f*) *Chase* v. *Westmore*, 5 M. & S. 180.

(*g*) *Bevan* v. *Waters*, 3 C. & P. 520. *Jacobs* v. *Latour*, 2 M. & P. 201; 5 Bing. 130. *Scarfe* v. *Morgan*, 4 M. & W. 284.

and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges (*h*).

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused. Thus, when oil, madder, dyewood, and fustic, were furnished to scribblers and fullers by a party who sent them cloth to be scribbled and fulled and dyed upon their premises, it was held that the lien of the scribblers and fullers was confined to the cloth, and did not extend to the oil, &c., furnished by the employers, and left upon the premises after the scribbling and fulling had been completed (*i*). And where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed. But such a lien may be established by custom and usage of trade, or by agreement of the parties (*k*). The lien of the artificer upon a chattel is strictly confined to work done upon it in making, mending, or repairing it. He cannot set up any claim against the owner for expenses incurred by him for warehousing it and taking care of it during the period of its detention (*l*); nor can he sell any portion of the property to cover the expenses he has incurred (*m*).

A party cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding, upon which he received the property. —Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be redelivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep (*n*), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions (*o*), the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he

(*h*) *Sanderson* v. *Bell*, 2 Cr. & M. 304.
(*i*) *Cumpston* v. *Heigh*, 2 Sc. 684.
(*k*) *Bleaden* v. *Hancock*, 1 M. & M. 465.
(*l*) *Brit. Emp. Ship Co.* v. *Somes*, 27 Law J., Q. B. 397. *Somes* v. *Brit. &c.*, 30 ib. Q. B. 229; Ell. Bl. & Ell. 353; 6 Jur. N. S. 761; 8 H. L. C. 338.
(*m*) *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 97; 29 Law J., Ch. 714.
(*n*) *Judson* v. *Etheridge*, 1 C. & M. 743. *Yorke* v. *Grenaugh*, 2 Ld. Raym. 868.
(*o*) *Orchard* v. *Rackstraw*, 19 Law J., C. P. 303.

requires them for the purpose of milking (*p*). And if a trainer of race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien (*q*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt (*r*). If a party receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter (*s*). If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner (*t*). Whenever goods in the hands of a bailee or depositary are, by the terms of the contract, to be redelivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien" (*u*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed (*x*). "If security" (such as a bill, note, or bond) "is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone" (*y*).

If a party, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded (*z*), "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property" (*a*). But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded. And if he claims a right to retain them for two separate

(*p*) *Jackson* v. *Cummins*, 5 M. & W. 342. *Chapman* v. *Allen*, Cro. Car. 273.
(*q*) *Forth* v. *Simpson*, 13 Q. B. 685.
(*r*) *Muir* v. *Fleming*, D. & R., N. P. C. 30.
(*s*) *Key* v. *Flint*, 8 Taunt. 23; 1 Moore, 451. *Buchanan* v. *Findlay*, 9 B. & C. 749.
(*t*) *Burn* v. *Brown*, 2 Stark. 273.
(*u*) *Crawshay* v. *Homfrey*, 4 B. & Ald. 52.
(*x*) *Raitt* v. *Mitchell*, 4 Campb. 146.
(*y*) *Hewison* v. *Guthrie*, 3 Sc. 298; 2 Bing. N. C. 759. *Cowell* v. *Simpson*, 16 Ves. 280. *Horncastle* v. *Farran*, 3 B. & Ald. 497.
(*z*) *Boardman* v. *Sill*, 1 Campb. 410, n. *Weekes* v. *Goode*, ante, p. 279.
(*a*) *White* v. *Gainer*, 9 Moore, 45.

charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists (*b*).

Parties against whom a lien may be claimed.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner (*c*), unless the party in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favour of all who require his services (post, ch. 10). Where the owner of a pony phaeton intrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and the phaeton, never having been painted or brought back, the plaintiff, after the expiration of three months, made search for it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien (*d*). And when a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs (*e*). It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to A to be repaired, and he by mistake takes it to B, that B would have no lien upon it for the price of the repairs, as the servant was not authorized to employ B in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognizant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coach-maker he may employ to do the repairs (*f*). It has been held, that if a person obtains possession of goods by fraud, and pawns them, the pawnee is entitled to a lien upon them for the money advanced as against the true owner (*g*). But the possession of the goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to which he has no colour of title, the *jus tertii* may always be set up against the pawnor by the pawnee (*h*).

(*b*) *Scarfe* v. *Morgan*, 4 M. & W. 281.
(*c*) *Hartop* v. *Hoare*, 3 Atk. 44. *Lempriere* v. *Pasley*, 2 T. R. 485. *Castellain* v. *Thompson*, 13 C. B., N. S. 105.
(*d*) *Buxton* v. *Baughan*, 6 C. & P. 674.
(*e*) *Hiscox* v. *Greenwood*, 4 Esp. 174.
(*f*) *Weldon* v. *Gould*, 3 Esp. 268.
(*g*) *Parker* v. *Patrick*, 5 T. R. 175; doubted in *Peer* v. *Humphrey*, 2 Ad. & E. 499; said to be good law by Parke, B., 15 M. & W. 219; and Cresswell, J., 20 Law J., C. P. 168.
(*h*) *Cheesman* v. *Exall*, 6 Exch. 345. As to pledges by Factors and Agents, see Addison on Contracts, pp. 300–310, 5th edit.

General lien is a right on the part of a manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman, or wharfinger, into whose hands goods have been placed to be worked up, repaired, or improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the party claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed cognizant of it, and to have contracted subject to the usage; but as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where parties carry on a trade or business in which a general lien is recognized, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien (*i*). A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods (*k*). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted, and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him (*l*). In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and packers, have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed, warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of, the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c.,

(*i*) *Bock* v. *Gorrissen*, 2 De G. F. & J. 434; 30 Law J., Ch. 42; 9 W. R. 209.

(*k*) *Walker* v. *Birch*, 6 T. R. 262.

(*l*) *Key* v. *Flint*, 1 Moore, 451; 8 Taunt. 21.

other goods which had previously been delivered back to their owners (*m*); and in other places, where no such usage has been shown to exist, they have been held to have no such general lien (*n*). The usage, when it exists, must be shown to be long established, and notorious, fair, and reasonable, and not contrary to any established principle of law (*o*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work (*p*), also that an agent who carries on business, in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business (*q*).

Lien of factors and brokers.—Factors and brokers to whom goods are consigned to be sold, have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers upon the goods whilst they are in their possession, and on the monies realised by the sale of them (*r*). This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists; but no such lien can be claimed as resulting from any general law of principal and agent (*s*). The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent (*t*), nor to goods which have not actually reached the hands of the factor (*u*), and come into his possession with the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence (*x*), or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance (*y*). And if the party from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise

(*m*) *Savill* v. *Barchard*, 4 Esp. 52. *Naylor* v. *Mangles*, 1 ib. 109. *Spears* v. *Hartly*, 3 ib. 81. *Rose* v. *Hart*, 8 Taunt. 499; 2 Moore, 547. *Webb* v. *Fox*, 2 Peake, N. P. C. 167.

(*n*) *Green* v. *Farmer*, 4 Burr. 2214; 1 W. Bl. 651. *Holderness* v. *Collinson*, 7 B. & C. 216.

(*o*) *Rushforth* v. *Hadfield*, 6 East, 528. *Leuckart* v. *Cooper*, 3 Sc. 521; 3 Bing. N. C. 99.

(*p*) *Blake* v. *Nicholson*, 3 M. & S. 167.

(*q*) *Foxcraft* v. *Wood*, 4 Russ. 488.

(*r*) *Kruger* v. *Wilcox*, Ambl. 252. *Hudson* v. *Granger*, 5 B. & Ald. 31. *Hammond* v. *Barclay*, 2 East, 227.

(*s*) *Bock* v. *Gorrissen*, 30 Law J., Ch. 42.

(*t*) *Houghton* v. *Matthews*, 3 B. & P. 485.

(*u*) *Kinloch* v. *Craig*, 3 T. R. 123.

(*x*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*y*) *Taylor* v. *Robinson*, 2 Moore, 730.

if he has made advances on the credit of the deposit, not knowing the depositor to be an agent (*z*). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor (*a*).

Insurance brokers have also, by the general usage and custom of trade, a lien upon every policy effected by them for the premium paid on such policy, and for their commission, and also for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all monies received by them upon such policies from the underwriters, unless the party for whom they effected the policy was himself only an agent in the matter; in which case the extent of their lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the party really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business (*b*).

Lien of bankers.—Bankers also, who are a species of factors in pecuniary transactions, have, by the general law of the land, a lien upon all the securities of their customers in their hands for their advances to such customers in the ordinary course of business (*c*), unless such securities have been received under special circumstances, and not in the ordinary way of their business as bankers, or under some special arrangement or understanding inconsistent with the exercise of the right, or limiting it to some specified amount (*d*). If title-deeds and securities for money, not being negotiable, are deposited in the hands of a banker by a person who is wrongfully possessed of them, or is not the true owner thereof, and is not authorized to raise money upon them, the banker has no better or further rights over them than the party who deposited them in his hands, and cannot set up a lien upon them as against the true owner (*e*). But as regards negotiable securities, such as exchequer bills, bills of exchange, and promissory notes, the right of general lien will extend to them, although the customer who delivered them to the banker was not the owner, but was holding them as an agent or trustee of some third party, unless the banker knew at the time he received the securities that they did not belong to the party from whom he received them. The lien of a banker upon the securities in his hands belonging to his customers is part

(*z*) *Pultney* v. *Keymer*, 3 Esp. 181. Addison on Contracts, pp. 300-303. *Freeman* v. *Appleyard*, 32 Law J., Exch. 175.

(*a*) *Dixon* v. *Stansfeld*, 10 C. B. 398.

(*b*) *Mann* v. *Forrester*, 4 Campb. 60. *Mann* v. *Shiffner*, 2 East, 259.

(*c*) *Davis* v. *Bowsher*, 5 T. R. 488.

(*d*) *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.

(*e*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

of the law merchant, and as such is judicially taken notice of by the courts (*f*).

Lien of attornies and solicitors.—Attornies and solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, for the costs not only of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients (*g*). But a solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished, and it may be superseded altogether by the attorney's taking from the client security for his costs (*h*). The town agent of a country attorney has a lien only upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the attorney in that particular cause. He cannot set up a claim of lien for the general balance due to him from the country attorney who employs him, and cannot retain the money or papers of the client to satisfy his general debt (*i*). And his lien is limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess (*k*).

An attorney cannot set up a general lien for the balance due to him, in respect of services not rendered by him as an attorney, nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town-clerk (*l*), or steward of a manor (*m*); he cannot set up any lien which is inconsistent with the nature of his employment, or the terms, or conditions, or express or implied trust upon which he received the papers (*n*). His right, moreover, is dependent upon the rights of his client, and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him (*o*).

(*f*) *Barnett* v. *Brandao*, 7 Sc. N. R. 331. *Wookey* v. *Pole*, 4 B. & Ald. 11. *Collins* v. *Martin*, 1 B. & P. 648.

(*g*) *Stevenson* v. *Blakelocke*, 1 M. & S. 535. *Lambert* v. *Buckmaster*, 2 B. & C. 616. *Blunden* v. *Desert*, 2 Dru. & W. 405. *Friswell* v. *King*, 15 Sim. 191.

(*h*) *Genges* v. *Genges*, 18 Ves. 294. *Balch* v. *Symes*, Turn. & R. 92.

(*i*) *White* v. *R. Ex. Ass. Co.*, 7 Moore, 249. *Moody* v. *Spencer*, 2 D. & R. 6; Anon. 2 Dick. 802.

(*k*) *Waller* v. *Holmes*, 1 Johns. & Hem. 239; 30 Law J., Ch. 24. *Re Andrew*, 7 H. & N. 87; 30 Law J., Exch. 403.

(*l*) *Champernown* v. *Scott*, 6 Mad. 93.

(*m*) *Rex* v. *Sankey*, 5 Ad. & E. 428.

(*n*) *Lawson* v. *Dickenson*, 8 Mod. 307.

(*o*) *Hollis* v. *Claridge*, 4 Taunt. 807. *Esdaile* v. *Oxenham*, 3 B. & C. 229. *Lightfoot* v. *Keane*, 1 M. & W. 745. *Molesworth* v. *Robbins*, 2 Jones & Lat. 358.

If an attorney transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds and writings, of one partner in respect of the business done for the firm (*p*).

Certificated conveyancers have no lien upon the papers and instructions placed in their hands for the purpose of enabling them to draw out a conveyance (*q*).

Lien of shipmasters.—An agent cannot acquire a lien upon the property of his principal for work done by others whom he has employed and paid. A shipmaster, therefore, has no lien upon a ship for money expended or debts incurred by him for repairs done to her on the voyage (*r*).

Lien for freight.—The lien of shipowners and masters of ships on goods and cargoes for freight, is regulated by the Merchant Shipping Acts (*s*).

Lien of consignees.—The general lien of a consignee upon goods consigned to him cannot be set up against positive directions given him by the consignor, and if he accepts a consignment accompanied by directions to apply the proceeds of it in a particular way, he is bound by such directions (*t*).

Notices that goods will be held subject to a general lien.—The right to retain for a general balance may, with certain exceptions presently noticed, be reserved by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, common ferryman, common farrier or smith, and not being bound to exercise his calling in favour of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus, where the dyers, dressers, bleachers, whisters, printers, and calenderers of Manchester, and the neighbourhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, &c., on the condition that such goods should not only be subject to the debts for the work and labour performed upon them, but also for the general balance due from the persons employing them for work and labour of the same kind performed upon goods which they had already delivered out of their possession, it was held that parties who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance (*u*).

General lien by custom of trade—Warehousekeepers—Wharfingers.—

(*p*) *Turner* v. *Deane*, 3 Exch. 836; 18 Law J., Exch. 343.

(*q*) *Steadman* v. *Hockley*, 15 M. & W. 553.

(*r*) *Hussey* v. *Christie*, 9 East, 433.

(*s*) 25 & 26 Vict. c. 63, s. 67.

(*t*) *Frith* v. *Forbes*, 32 Law J., Ch. 10.

(*u*) *Kirkman* v. *Shawcross*, 6 T. R. 14.

Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all monies or any balance thereof due from such merchants to such public warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable whilst warehoused for custody, to satisfy a debt already due from the factor to the warehousekeeper, in respect of other goods" (*x*). Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another (*y*). If a wharfinger has a general authority to receive all goods directed for A. B., and goods come to his wharf directed by mistake for A. B., the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from A. B. to him (*z*).

Lien of policy-brokers.—If a policy-broker is employed by an agent to effect a policy of insurance for the benefit of such agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the insurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent, as well as for his com-

(*x*) Tindal, C. J., *Leuckart* v. *Cooper*, 3 Sc. 531; 3 Bing. N. C. 99; 35 Hen. 6, 33, cited *Rex* v. *Humphery*, 1 Mc. Clel. & Y. 193.

(*y*) *Dresser* v. *Bosanquet*, 7 Law T. R., N. S. 424; 11 W. R. 147.

(*z*) *Richardson* v. *Goss*, 3 B. & P. 123.

mission, and charges for effecting the policy (*a*). But if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral (*b*), or a statement that the insurance is to be effected "for a correspondent in the country" (*c*), or that the property to be insured belongs to a merchant abroad who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading (*d*), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

Extinguishment of lien by abandonment of possession.—If a bailee who has a right of lien upon property in his possession, voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property his right of lien does not revive (*e*); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished (*f*). Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien (*g*). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody, have been held to be the servants of such masters holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship (*h*).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien (*i*), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale. An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London (*k*). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien (*l*); but if the execution is against the owner of the goods, he is entitled then to

(*a*) *Mann* v. *Forrester*, 4 Campb. 61. *Westwood* v. *Bell*, ib. 355. *Olive* v. *Smith*, 5 Taunt. 56.
(*b*) *Maauss* v. *Henderson*, 1 East, 337.
(*c*) *Snook* v. *Davidson*, 2 Campb. 218.
(*d*) *Lanyon* v. *Blanchard*, ib. 597.
(*e*) *Sweet* v. *Pym*, 1 East, 4.
(*f*) *Wallace* v. *Woodgate*, R. & M. 194.
(*g*) *Jacobs* v. *Latour*, 2 M. & P. 205.
(*h*) *Reeves* v. *Capper*, 5 Bing. N. C. 136.
(*i*) *Clerk* v. *Gilbert*, 2 Bing. N. C. 357.
(*k*) *Jones* v. *Pearle*, Str. 556.
(*l*) *Legg* v. *Evans*, 6 M. & W. 42.

seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and re-establish his lien, provided the rights of no third party have intervened.

Statutory power of sale in discharge of a right of lien.—By the Merchant Shipping Act, 1862, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them (*m*).

Tender of the debt in extinguishment of the right of lien.—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created by a tender of the money due upon them (*n*). Where a lease was deposited with the defendants as a security for the repayment of 150*l.* on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease (*o*).

Detention of goods and chattels, deeds and securities, by one of several joint-owners or tenants-in-common.—"If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time" (*p*). Where two have an equal interest in a deed, and each may have occasion to use it, as for instance, where the same deed grants Whiteacre to A, and Blackacre to B, it is manifest that both cannot hold the deed at the same time; and to avoid any unseemly contest for the possession of it, it

(*m*) 25 & 26 Vict. c. 63, ss. 73–76.
(*n*) *Ratcliff* v. *Davies*, Cro. Jac. 244.
(*o*) *Chilton* v. *Carrington*, 15 C. B. 105.
(*p*) Litt. sec. 323.

has been held that he who first gets hold of it is entitled to keep it. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer (*q*).

Re-delivery of chattels to one of several joint-bailors.—If an action is brought by several joint-bailors against a bailee for the non-delivery of goods deposited in his hands by a joint-bailment from all of them, it is a good defence to the action that the goods bailed by the plaintiffs to the defendant have been delivered up to one of them. "It is said," observes Lord Campbell, "that this is no defence, because the contract of bailment was not to deliver them except to the plaintiffs jointly. But as, in fact, one of the plaintifis has got the goods, the question arises whether he can sue the defendants for giving them to himself. It would be contrary to all principle, and the cases show that it would be contrary to all law, if he could. I do not think an action could be maintained against bankers in this position more than against others; but it is not to be supposed they could therefore with impunity deliver up to one person securities deposited with them to hold for several persons. I think, in such a case, they would stand in the relation of trustees for all the joint-bailees; and there would be a clear remedy in equity for the breach of trust in delivering the joint property to one only of the cestui que trusts" (*r*).

SECTION II.

OF ACTIONS FOR THE NEGLIGENT MANAGEMENT, NEGLIGENT KEEPING, AND UNLAWFUL DETAINING OF GOODS AND CHATTELS.

Parties to be made plaintiffs.—Where injury has been sustained by the servants of a bailee from the negligence of the bailor, in not giving notice of the dangerous nature of the subject-matter of the bailment, the servant is the proper party to sue for damages (*s*). A mere gratuitous bailment of a chattel to another does not, as we have seen, remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third party who takes the chattel out of the hands of the bailee and refuses to deliver it to the bailor on demand (ante, p. 305). In cases

(*q*) *Foster* v. *Crabb*, 12 C. B. 136.
(*r*) *Brandon* v. *Scott*, 7 Ell. & Bl. 237; 26 Law J., Q. B. 163.
(*s*) *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 137.

of gratuitous bailment, the bailee generally holds the chattels merely at the will of the bailor, and is bound to return them whenever required so to do. Where, therefore, brewers sell porter in casks, and lend the casks to their customers until they are emptied, they may maintain an action against a wrong-doer for taking and detaining the empty casks (*t*). And where chattels let to hire have been permanently injured or destroyed whilst in the hands of the bailee by a wrong-doer, the bailor, or owner of the chattels, may maintain an action on the case in respect of the damage done to his reversionary interest in them. The mere outstanding right of the bailee to the use of the chattels does not debar the owner of this right of action (*u*).

In all cases of bailment of chattels by one person to another for hire or reward, it is essential that the bailee should preserve his dominion and control over the property, and his power of restoring it to the owner. If, therefore, he parts with the possession of the chattel, and places it under the dominion and control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed (*x*).

Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled, as we have seen, to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter (*y*). Where, for example, goods have been bailed by the owner to a warehousekeeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehousekeeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them ; but he may, if he pleases, at once attorn to the purchaser, and rely upon the title of the latter (*z*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bonâ-fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter

(*t*) *Manders* v. *Williams*, 4 Exch. 343.
(*u*) *Mears* v. *Lond. & S. West. Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 220.
(*x*) *Cooper* v. *Willomat*, 1 C. B. 682.
(*y*) Ante, pp. 274, 275. *Lee* v. *Bayes*, 18 C. B. 607; 25 Law J., C. P. 249. *Solomons* v. *Dawes*, 1 Esp. 82.
(*z*) *Ogle* v. *Atkinson*, 5 Taunt. 762. *Cheesman* v. *Exall*, 6 Exch. 344; ante, p. 274.

to deliver them to him within a reasonable time after the demand (ante, p. 274), may maintain an action for the conversion or detention of the property (*a*), the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C. J., must be taken to apply, that if A bail goods to C, and after give his whole right in them to B, B cannot maintain detinue for them against C, because the special property that C acquires by the bailment is not thereby transferred to B (*b*). If the right of property in the subject-matter of the bailment has been transferred by devise, the devisee may sue for the detention or loss of the property, and it is no answer to the action to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee (*c*). So, if the right of property in title-deeds, or an heir-loom, comes to the heir-at-law by descent, the heir is the proper party to sue for their detention (*d*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them (*e*).

Joint and separate rights of action.—If a chattel has been deposited by two joint-owners of it in the hands of a bailee, who has agreed to keep it for the two, it is not in the power of one of them to take it out of his hands without the consent of the other (*f*). If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners (*g*). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them (*h*). And if the defendant is a mere wrong-doer, having got into his hands the property of

(*a*) *Franklin* v. *Neate*, 13 M. & W. 484; 1 Rolle. Abr. DETINUE, C. 2, 3.
(*b*) *Rich* v. *Aldred*, 6 Mod. 216.
(*c*) *Goodman* v. *Boycott*, 2 B. & S. 1; 31 Law J., Q. B. 69.
(*d*) Bro. Abr. DETINUE, pl. 30, 45.
(*e*) *Freeman* v. *Birch*, 1 N. & M. 420. *Nicolls* v. *Bastard*, 2 C. M. & R. 660; ante, pp. 304–306.
(*f*) Ld. Ellenborough, *May* v. *Harvey*, 13 East, 199. *Nathan* v. *Buckland*, 2 Moore, 153; ante, p. 306.
(*g*) *Attwood* v. *Ernest*, 13 C. B. 889; 22 Law J., C. P. 225.
(*h*) *Brandon* v. *Scott*, 7 Ell. & Bl. 237; 26 Law J., Q. B. 163.

several joint-owners, none of whom have authorized him to detain it, any one of such joint-owners may bring an action of detinue against him (*i*). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*k*), "as if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detinue (*l*); or all the owners may be joined as plaintiffs, except in the case of deposits of money in the hands of bankers." Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages (*m*).

Power to compel rival claimants to establish their title by garnishment and by interpleader.—By the common law, whenever one person had deposited goods in the hands of another, to be re-delivered to the bailor, and a third party came and claimed the goods of the depositary, and brought an action of detinue for their recovery, the bailee might pray garnishment, *i.e.* that the bailor might be garnished or warned of the claim made by the stranger upon the depositary, and summoned to show to the court whether the goods were his property or not; and upon this prayer of garnishment a *scire facias* issued against the depositor to appear and plead with the plaintiff, and the latter thus became the defendant to the suit under the name of the garnishee, the first defendant, the depositary, being considered out of court by the garnishment (*n*). By 1 & 2 Wm. 4, c. 58, s. 1, it is enacted, that all depositaries or stakeholders who are sued in the superior courts, or the courts of pleas of Lancaster or Durham, for the recovery of deposits held by them, there being at the time other claimants thereon besides the plaintiff in such action, may apply to the court after declaration, and before plea, by affidavit or otherwise, showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or is supposed to belong to some third party, who has sued, or is expected to sue, for the same; and that the defendant does not collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court, or any judge thereof, may direct; and the court, or any judge thereof, after such application has been made, may make a rule or order calling upon such third party to appear and state the nature and particulars of his claim, and maintain or relinquish it, and in the meantime stay the proceedings in the action, and, finally,

(*i*) *Broadbent* v. *Ledward*, 11 Ad. & E. 209.

(*k*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 852.

(*l*) Thel. Dig. lib. ii. cap. 47, s. 8. *Broadbent* v. *Ledward*, 11 Ad. & E. 211.

(*m*) *Metcalfe* v. *Lond. & Br. Rail. Co.*, 4 C. B., N. S. 310; 27 Law J., C. P. 333.

(*n*) 3 Reeves, 448; Com. Dig. Pleader, 2 x. 8. *Rich* v. *Aldred*, 6 Mod. 216.

order such third party to make himself defendant in the same, or some other action, and generally dispose of the claims, and make such rules or orders as may appear just and reasonable (*o*); and the powers and authorities of this statute are by 23 & 24 Vict. c. 126, s. 12, made to extend to cases where the titles of the claimants have no common origin, but are adverse to, and independent of, each other (*p*).

Declarations against bailees for loss of chattels.— If the plaintiff complains of the loss of chattels delivered by him to the defendant to be safely kept, or to be mended or repaired, or to be dealt with by the defendant in the way of his trade, it is sufficient for the plaintiff to set forth the delivery by him of the chattels to the defendant (describing them), and stating the purpose for which they were delivered, and to allege generally that the defendant, having received possession of the chattels from the plaintiff, did not take due and proper care of them, and by reason thereof they became wholly lost to the plaintiff (*q*); but it is not now necessary to show on the face of the declaration how the chattels got into the hands of the defendant, or to allege that they were lost or destroyed through his negligence. If the chattels have been delivered by the plaintiff to the defendant, and the defendant is unable to return them, from any cause whatever, the ordinary declaration in detinue will suffice (*r*).

In actions of detinue, the declaration formerly alleged that the plaintiff delivered the chattels to the defendant, to be re-delivered on request; but this allegation of a bailment was wholly immaterial, and not traversable, the gist of the action being the detainer of the property (*s*); and the form given by the Common Law Procedure Act simply alleges that the defendant detains from the plaintiff his goods and chattels (describing them), or his title-deeds of land called ——— in the county of ———, describing the deeds, and that the plaintiff claims a return of the goods and chattels, or deeds, or their value, and £—— for their detention (*t*). If any special damage has resulted to the plaintiff from the detention, the nature of it should be set forth on the face of the declaration. If, for example, by reason of the detention by the defendant of the title-deeds to an estate, the plaintiff has been prevented from selling or letting property to advantage, and from receiving money, the fact should be stated and relied upon in aggravation of the damages (*u*).

Declarations against bailees for damage to chattels.—Where the plaintiff's declaration alleged that the defendant undertook, safely and securely, to raise up several hogsheads of brandy of the plaintiff then in a certain

(*o*) *Coggs* v. *Bernard*, Ld. Raym. 909.
(*p*) *Meynell* v. *Angell*, 8 Jur. N. S. 1211; 11 W. R. 122. *Best* v. *Hayes*, 32 Law J., Exch. 129.
(*q*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256.
(*r*) *Reeve* v. *Palmer*, 5 C. B., N. S. 84. *Jones* v. *Dowle*, 9 M. & W. 19.
(*s*) *Clossman* v. *White*, 7 C. B. 56.
(*t*) 15 & 16 Vict. c. 76, s. 59; and Sched. B. 29.
(*u*) *Goodman* v. *Boycott*, ante, p. 369.

cellar, and to lay them down again in a certain other cellar, and that the defendant and his servants so negligently and carelessly put down the hogsheads in the said other cellar that, through want of care on their part, the casks were staved, and a great quantity of brandy was spilt, it was held that the declaration disclosed a good cause of action, though it did not allege that the defendant was a common porter, or that he was to have any reward for his pains (*x*).

If the plaintiff complains of an injury done to a horse lent by him to the defendant, it is sufficient to set forth the plaintiff's possession of the horse, the delivery of it by the plaintiff to the defendant for a certain specified purpose, or to be ridden in a moderate, careful, and proper manner, and to aver that the defendant used the horse for a different purpose from that for which it was lent, showing in what way he was used, and that the defendant did not take due and proper care of the horse, but used and managed it so carelessly and imprudently that the horse was, through the carelessness and negligence of the defendant, greatly injured and lessened in value.

Plea of not guilty.—In actions for loss of, or damage to, goods, the plea of not guilty operates, as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant. Thus, in an action against a bailee for the loss of, or damage to, goods delivered to him to keep, or to be carried, or otherwise dealt with, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant for the purpose set forth in the declaration, or of the plaintiff's property in the goods (*y*).

Plea of non-detinet.—The plea of non-detinet, alleging that the defendant does not detain the goods and chattels in the declaration mentioned, operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial is admissible under that plea (*z*). If, therefore, the defence be that the defendant was justified in detaining the goods, in respect of some special property in them, or as having a lien upon them, he must set forth such right specially on the record. He cannot give in evidence, under the plea of non-detinet, that the goods were pawned to him for money which has not been paid; neither can he give in evidence a gift from the plaintiff, for that proves that he does not detain the plaintiff's goods, and must be put in issue by a plea denying the plaintiff's right of property in the goods (*a*). If the defendant claims a right to retain possession of the goods on the ground that he is himself joint-owner of them with the plaintiff, or that he is tenant-in-common of

(*x*) *Coggs* v. *Bernard*, Ld. Raym. 909.

(*y*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.

(*z*) Reg. Gen. Hil. T. 16 Vict. 15; 1 Ell. & Bl. App. lxxxi.

(*a*) *Richards* v. *Frankum*, 6 M. & W. 420.

them with him, his interest should be specially pleaded and set forth upon the record (*b*). But under the general issue the defendant may show that the goods belonged to a firm in partnership, and were placed in the defendant's hands by a solvent partner, to be sold for the purpose of paying the partnership debts (*c*), or that they were delivered to a third person with the plaintiff's consent (*d*).

Pleas of delivery to one of several joint-plaintiffs.—We have already seen that it is a good defence to an action brought by several joint-plaintiffs against a defendant, for the recovery of chattels deposited in his hands by a joint-bailment from all of them, to plead that, before the commencement of the action, the chattels mentioned in the declaration were delivered by the defendant to one of the plaintiffs (ante, p. 376).

Pleas denying the plaintiff's property.—Under a plea alleging that the goods and chattels in the declaration mentioned were not, nor are they, the goods and chattels of the plaintiff, the defendant may set up a *jus tertii*, and show that the goods were not the goods of the plaintiff at the time they were delivered to the defendant; that the defendant had no notice thereof until the true owner afterwards gave notice of his title, and forbade the defendant to deliver up the goods to the plaintiff. It has been held by the Court of Queen's Bench that the defendant, under a plea denying that the goods detained were the goods of the plaintiff, may show that he had a lien upon them (*e*); but the Court of Exchequer has come to a different decision, and holds that if the defendant sets up a right to detain on the ground of lien, he must plead such right specially on the record. "We are aware," observes Alderson, B., "that this is contrary to an opinion of the Court of Queen's Bench in the case of *Lane* v. *Tewson;* but we cannot agree with that decision. The case was not fully argued before the court, nor were the authorities, which we think have decided that question, fully laid before them" (*f*).

Pleas justifying detention under claim of lien (*g*) usually allege, that the chattels mentioned in the declaration were delivered by the plaintiff to the defendant, to be worked upon, repaired, or mended, by the defendant for hire in the way of his trade; and that the defendant worked upon, repaired, or mended, the chattels, and that a certain specified sum of money became due to the defendant in respect of such work and labour, and that the plaintiff has not paid or tendered to the defendant the said sum so due to him, and that the defendant detained the chattels as security for the payment thereof. If the defendant wishes to set up a general lien for work done on other goods of the plaintiff, the defendant

(*b*) *Mason* v. *Farnell*, 12 M. & W. 684.
(*c*) *Morgan* v. *Marquis*, 23 Law J., Exch. 21; 9 Exch. 145.
(*d*) *Anderson* v. *Smith*, 29 Law J., Exch. 460.
(*e*) *Lane* v. *Tewson*, 12 Ad. & E. 116.
(*f*) *Mason* v. *Farnell*, 12 M. & W. 684.
(*g*) *Barnewall* v. *Williams*, 7 M. & Gr. 403, ante, pp. 363–375.

should show on the face of his plea whether he founds his claim on custom or contract. If he claims a general lien by custom of trade, he should show the nature of the trade he carries on; the existence of the custom; the delivery to him of goods, from time to time, to be worked upon or dealt with by him for hire in the way of his trade, subject to such custom; the dealing with the goods by him, so as to entitle him to his hire; the amount due to him at the time he received the goods; the work done by him thereon, and his claim to detain them until he has been paid the general balance due to him (*h*).

Pleas of payment of money into court.—By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 25), the defendant, in any action for detaining the goods of the plaintiff, may, by leave of the court or a judge, and upon such terms as they or he shall think fit, pay into court a sum of money to answer the claim of the plaintiff in respect of the goods alleged to be detained, the payment to be pleaded according to the provisions of the Common Law Procedure Act, 1852, and the like proceedings may be had and taken thereupon as to costs and otherwise.

Evidence—Proof on the part of the plaintiff.—Although the only plea on the record be a plea of not guilty, or non-detinet, the plaintiff must nevertheless give some general evidence of a right on his part to have the chattels delivered up to him. If he proves that the goods were at one time in his possession, and that they were taken away by the defendant; or if the plaintiff shows that he himself delivered the goods to the defendant, and afterwards demanded them back again, and that the defendant refused to deliver them, he establishes a *primâ facie* right to the possession of the goods, and will be entitled to a verdict under a plea of not guilty. But if the goods were not delivered by the plaintiff to the defendant, or taken out of the possession of the plaintiff, there is nothing to show that he has any right to have them (*i*). If it appears, on the plaintiff's own showing, that he and the defendant are joint-owners of the goods, or tenants-in-common of them, he does not establish any right to take them out of the hands of the defendant, nor does he prove that the defendant detains the goods from the plaintiff, for one of several joint-owners, or tenants-in-common, of a chattel, who has got possession of the chattel, has a right, as we have seen, to retain such possession (*k*).

Where a testator, two years before his death, gave some railway debentures to the defendant, intending to transfer the money secured by them to the defendant, and delivered the debentures to the defendant, who took possession of them, and locked them up in his own desk, but no

(*h*) *Coombs* v. *Noad*, 10 M. & W. 127. *Cumpston* v. *Haigh*, 2 Bing. N. C. 449. *Leuckhart* v. *Cooper*, 3 ib. 99.

(*i*) *Land* v. *North*, 4 Doug. 266; ante, pp. 310, 311.

(*k*) *Foster* v. *Crabb*, 12 C. B. 151; ante, pp. 277, 278, 375, 376.

transfer of the debts secured by the debentures was ever made, in accordance with the act of parliament regulating the transfer of such securities, and after the testator's death his executors sued the defendant for detaining the debentures, it was held that they were not entitled to recover them (*l*).

The charters and evidences of title to realty belong to the parties in whom the legal interest in the property is vested (*m*); but the right to the possession of bonds and securities for money remains vested in parties beneficially interested, who have got possession of the security and claim to hold it (*n*).

The detention necessary to support an action of detinue is an adverse or wrongful detention. It must be proved that the defendant withholds the goods, and prevents the plaintiff from having the possession of them. There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and a refusal to deliver on the part of the defendant. A defendant, having the goods in his possession, is not by reason thereof bound to seek out the plaintiff and send them to him. The plaintiff must come for them (*o*). It may be that the goods are the plaintiff's, and yet the detention of them by the defendant may be perfectly lawful (*p*).

If the plaintiff makes out a *primâ facie* right to the possession of the chattels, and shows that he has demanded them, and that the defendant detains them from him, the title or right of property in the goods cannot be investigated unless it has been put in issue by a plea traversing the plaintiff's right of property.

Evidence for the defence.—As the authorities show that it is no answer to an action of detinue, when a demand is made for the re-delivery of a chattel, to say that the defendant is unable to comply with the demand, by reason of his own negligence or breach of duty, it is clearly no answer to say that he has lost the chattel, and is consequently unable to re-deliver it to the plaintiff (*q*).

If the defendant relies upon a plea denying the plaintiff's right of property in, or right of possession of, the goods, the defendant must prove his title to them. A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been defeated by matter subsequent to the bailment or to the recognition of the title by the defendant (*r*). He may refuse to re-deliver the goods to

(*l*) *Barton* v. *Gainer*, 3 H. & N. 389; 27 Law J., Exch. 390. *Kelsack* v. *Nicholson*, Cro. Eliz. 496.

(*m*) Ante, pp. 283, 284. *Searle* v. *Law*, 15 Sim. 390.

(*n*) *Oliver* v. *Oliver*, ante, p. 284.

(*o*) *Clements* v. *Flight*, 16 M. & W. 42; Fitz. Nat. Brev. 138 A.

(*p*) *Clossman* v. *White*, 7 C. B. 55.

(*q*) *Reeve* v. *Palmer*, 5 C. B., N. S. 90, 92. *Goodman* v. *Boycott*, ante p. 378.

(*r*) *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 Law J. Exch. 407; ante, pp. 309, 310.

the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them (*s*); but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii* (*t*). If the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, he may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defendant detained the plate by the order and under the authority of the latter (*u*).

Proof of abandonment of possession before commencement of action.—It is no answer to an action for detaining goods to show that the defendant abandoned possession of the goods before action, by delivering them over to some third party. The evidence of the detention is, that the defendant having taken possession of the plaintiff's chattel, does not return it when demanded (*x*). But if the defendant has parted with the possession of the property before the plaintiff's title to it accrued, he has not then detained it as against the plaintiff, and is not liable in detinue. Thus, where the defendant took possession of goods to which he conceived himself to be entitled under a will, which turned out to be invalid from want of due execution, and before letters of administration were taken out, and before there was any legal representative appointed with authority to demand and receive the goods, the defendant delivered them back to the party from whom he received them, and then the plaintiff took out administration and demanded the property of the defendant, it was held that he could not recover, as the defendant had never detained the goods as against him (*y*). But the mere loss of the subject-matter of the bailment is no answer to an action of detinue by a plaintiff who became the owner, and entitled to the possession, of the thing bailed, and demanded it after the loss thereof by the defendant (*z*).

(*s*) *Shelbury* v. *Scotsford*, Yelv. 22.
(*t*) *Armory* v. *Delamirie*, 1 Str. 505.
(*u*) *Cheesman* v. *Exall*, 6 Exch. 344.
(*x*) *Jones* v. *Dowle*, 9 M. & W. 19.
(*y*) *Crossfield* v. *Such*, 8 Exch. 828.
(*z*) *Goodman* v. *Boycott*, 2 B. & S. 1; 31 Law J., Q. B. 69.

Damages recoverable—Orders for delivery of the specific thing detained.—In the old action of detinue, the defendant had the option of retaining possession of the chattel detained, paying to the plaintiff the sum at which the jury thought proper to assess its value (*a*). "The judgment," observes Frowike, C. J., "is, that the plaintiff shall recover the goods or their value; then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and if he will not, then the value as it is taxed by the inquisition. And so it is in the election of the defendant to deliver to the plaintiff the goods or the value" (*b*). This option on the part of the defendant being felt to operate as a hardship upon the plaintiff in many cases, it has been taken away by the Common Law Procedure Act, 1854, which enacts, s. 78, that the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and if the chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action.

The jurisdiction of the judge, under s. 78 of this statute, is solely applicable to a case where the value is found, so that no order can be made where such value has not been found (*c*). The regular and legal finding of the jury, under s. 78, is a finding of so much for the value of the thing detained, and so much by way of damages for its detention. If the value of the chattel is not assessed by the jury, the course provided by s. 78 is not applicable. The Court of Chancery has also jurisdiction to order a specific chattel to be delivered up to the person seeking to enforce his right to it, where the latter has not fixed the price of the article, or assessed its value, and thereby furnished the measure of his own damages (*d*).

Assessment of value.—The value of the thing detained should be assessed at the highest price it bore in the market at any time during the period of its detention (*e*); and where the value is doubtful, and the defendant might have returned it if he had thought fit, every fair presumption and inference should be made in favour of the owner of the property

(*a*) *Phillips* v. *Jones*, 15 Q. B. 867.
(*b*) Keilw. 64 b.; Yelv. 71.
(*c*) *Chilton* v. *Carrington*, 15 C. B. 730; 24 Law J., C. P. 78.
(*d*) *Dowling* v. *Betjemann*, 2 Johns. & H. 544; 8 Jur. N. S. 538.
(*e*) *Archer* v. *Williams*, 2 C. & K. 27. *Barrow* v. *Arnaud*, 8 Q. B. 609.

seeking its restitution, and against the wrong-doer who has detained it from him. But where the value of the article lies peculiarly within the knowledge of the plaintiff, he should prove the value of it, in order to enable the jury to make a correct assessment of the damages. Thus, when he sues for the detention of letters and documents, he should prove the nature of the letters, and of what use they were to him (*f*). If he sues for the detaining of title-deeds, he should prove the value of the property to which they refer, and that the deeds are essential to the establishment of the title, and he will then be entitled to have the damages assessed at the value of the estate (*g*).

Having assessed the value of the thing detained, the jury should then assess a certain sum by way of damages for the detention of it. Those who take upon themselves to detain the property of another are answerable for all the consequences that naturally result, in the ordinary course of things, from the wrongful act (*h*).

Assessment of damages where the whole, or part, of the goods have been delivered up after action.—The object of an action for detaining goods is to recover the goods in specie, or their value to be assessed by a jury, and also damages occasioned by their detention. This object is only partially answered by the delivery of the goods to the plaintiff, and their acceptance by him since the commencement of the suit: the plaintiff having a right to recover by the verdict of the jury the damage he has sustained by reason of the goods having been improperly detained. If all or any of the goods have been delivered up after suit, the plaintiff can have no judgment to recover them or their value, but he may have judgment to recover damages for their detention if the plaintiff has sustained any; and for the residue not delivered up, the plaintiff may have the usual judgment to recover them or their value, and damages for their detention (*i*). In an action of detinue for several goods, which were collectively valued at one sum in the declaration and by the jury, it was held that if all the goods were not given up—if one article was withheld—the defendant was liable for the value of all; but in detinue for two things, the defendant may before verdict give up one, and plead as to the other (*k*). If there is a good defence to part of the goods, by reason that the defendant was always ready to deliver them, the jury must assess the value of the residue of the goods, and damages for the detention, but none as to the goods delivered up. If there was no defence as to them, then the jury must assess the value of the residue of the goods, and damages for the prior detention of those that were delivered up (*l*).

(*f*) *Anderson* v. *Passman*, 7 C. & P. 197.
(*g*) Rolle's Abr. DETINUE, E.
(*h*) *Davis* v. *Lond. & North-West. Rail. Co.*, 7th Week Rep. 105.
(*i*) *Crossfield* v. *Such*, 8 Exch. 165; 22 Law J., ib. 65.
(*k*) Bro. Abr. TENDER, pl. 39.
(*l*) *Crossfield* v. *Such*, ut sup. *Pawly* v. *Holly*, 2 W. Bl. 853.

The jury may find the fact of the return or re-delivery of the chattel specially, and confine themselves to an assessment of damages for the detention of it. In an action for detaining railway-scrip, which had been delivered up to the plaintiff after the commencement of the action, under a judge's order, it was held that the judge was warranted in directing the jury at the trial, that in estimating the damages they might take into consideration the difference in the value of the scrip at the time of the demand and the time of its delivery to the plaintiff under the judge's order (*m*).

Where railway-scrip shares or stock have been unlawfully detained after demand, and given up after the commencement of the action, the measure of damages is the highest sum the scrip could have been sold for during the period of its detention, deducting the value of it at the time it was received back by the plaintiff. The wrong-doer cannot get off with less than that, and may have to pay greater damages (*n*).

Wherever the defendant has wrongfully detained the plaintiff's chattels, or has wrongfully withheld from him the means of obtaining possession of them, he is answerable for all the loss naturally resulting in the ordinary course of things from his wrongful act, provided the special damage is specified and claimed in the plaintiff's declaration (*o*).

Evidence in mitigation of damages.—In an action for damages for the detention of goods, it may be shown in mitigation of damages that the goods were subsequently seized by revenue officers, and forfeited to the crown for non-payment of duty (*p*).

A defendant who has wrongfully detained the plaintiff's horse cannot make the expense of the horse's keep, whilst he was wrongfully detained, a ground for reduction of the damages (*q*).

(*m*) *Williams* v. *Archer*, 5 C. B. 318. *Barrow* v. *Arnaud*, 8 Q. B. 609.
(*n*) *Archer* v. *Williams*, 2 C. & K. 27.
(*o*) *Barrow* v. *Arnaud*, 8 Q. B. 610.
(*p*) *Davis* v. *Nest*, 6 C. & P. 169.
(*q*) *Wormer* v. *Biggs*, 2 C. & K. 36.

CHAPTER X.

OF NEGLIGENCE OF BAILORS AND BAILEES — LIABILITIES OF COMMON CARRIERS, COMMON FERRYMEN, COMMON INNKEEPERS, AND LODGING-HOUSE KEEPERS (r).

SECTION I.—*Of negligence and breach of duty on the part of common carriers.*— Of the duties and responsibilities of common carriers—Who may be said to be a common carrier—Of the public profession of railway companies made through the medium of their time-tables—Of the duty of railway and canal companies to afford all reasonable facilities for the carriage of passengers, merchandise, and chattels,—Loss of goods by common carriers—Concealment of risk by consignors—Contributory negligence of consignors—Inability of the common carrier to rid himself of the public duties of his profession and calling—Statutory exemption of common carriers from liability in respect of the loss of gold and silver, and valuables, when the value has not been declared—By whom the declaration of value is to be made and the increased rate of carriage paid—Articles to which the statute extends—Loss of goods from theft by common carrier's servants—Notices, conditions, and special contracts by railway companies—What are just and reasonable conditions—Commencement and duration of the liability of the common carrier—Delivery of goods at the place of destination—Delivery of luggage at railway stations—Acceptance of goods to be carried beyond the limits of a particular line of railway—Loss of luggage by railway companies—Loss of merchandise carried as luggage—Effect of the refusal of the consignee to receive the goods—Landing of goods by shipowners—Lien of common carriers—Railway charges—Packed parcels—Passenger fares—Right to alight at intermediate stations—Negligence of common ferrymen.

SECTION II.—*Negligence and breach of duty on the part of common innkeepers and lodging-house keepers.*—Who may be said to be a common innkeeper—Loss of goods by common innkeepers—Limitation of the liability of innkeepers—Deposit of property with innkeepers—Losses occasioned by the misconduct of the guest—Lien of innkeepers—Liability of lodging-house keepers.

SECTION III.—*Remedies against common carriers and common innkeepers.*—Summary proceedings against railway companies for not receiving and forwarding traffic—Parties to actions against common carriers and common innkeepers—Pleadings—Defences—Evidence—Damages recoverable—Injunction to enforce compliance with the railway and canal traffic act.

SECTION I.

OF NEGLIGENCE AND BREACH OF DUTY ON THE PART OF COMMON CARRIERS.

Duties and responsibilities of common carriers.—Every common carrier is bound to accept and carry all such things as he publicly professes to carry for all persons who are ready and willing to pay him his customary

(r) See further, as to common carriers, Addison on Contracts, ch. 13; innkeepers and lodging-house keepers, ch. 10, s. 2, 5th ed.

hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey (*s*). He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm (*t*); for whenever a man undertakes the public office or profession of a common carrier of goods he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him (*u*).

The nature and extent of the employment or business which the common carrier expressly or impliedly holds himself out as undertaking will regulate the extent of his rights, duties, and responsibilities. If he selects a particular line or description of business, he cannot, so long as he adheres to it with good faith, be compelled to go beyond it. A common carrier of merchandise, for example, cannot be compelled to carry coals, marble, money, or bank-notes, dogs, pigs, horses, or live animals. A common carrier of passengers only cannot be compelled to carry merchandise, and a common carrier of merchandise and parcels cannot be compelled to carry passengers (*x*). But he may, if he pleases, carry under a special acceptance or a special contract, any article which he does not profess to carry, and does not commonly carry, and by this special contract he may define the nature and extent of his engagement, and the degree of risk he will incur, stipulating that in the particular transaction he is not to be regarded as being in the exercise of his public employment, but as carrying in a private capacity, and incurring no responsibility beyond that of an ordinary bailee for hire, answerable only for his own misconduct and negligence, and that of the servants and workmen he employs for executing the work.

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, consisting of articles of clothing, and such things as a traveller usually carries with him for his own personal convenience, but he is not bound to carry merchandise or articles wholly unconnected with luggage, unless he professes to carry merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise (*y*).

Who may be said to be a common carrier.—Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a COMMON CARRIER. Such are railway companies, who profess to carry passengers,

(*s*) Bac. Abr. CARRIERS, B. *Pickford* v. *Grand Junc. R. Co.*, 8 M. & W. 372.

(*t*) *Crouch* v. *Lond. & North-W. R. Co.*, 14 C. B. 290; 23 Law J., C. P. 73.

(*u*) Keilwey, 50, pl. 4.

(*x*) *Johnson* v. *Mid. Rail. Co.*, 4 Exch. 373.

(*y*) *Gt. North. Ry. Co.* v. *Shepherd*, 8 Exch. 30; 21 Law J., Exch. 114.

parcels, and merchandise from one place to another, stage-coach and stage-waggon proprietors, lightermen, hoymen, barge-owners, canal boatmen, and the owners and masters of ships and steamboats employed as general ships for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination (*z*). The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cab-driver or hackney-coachman, for example, is not a common carrier (*a*).

Public profession of railway companies through their time-tables and toll-tables.—If a railway company publishes, or authorizes the publication of a time-table, representing that a train will run at a particular hour to a particular place, and the representation is false, the company is responsible in damages to all persons who have acted upon the faith of the representation, and have been deceived and put to expense, and have sustained damage thereby (*b*). The company make a continuous representation whilst they continue to hold out printed or written papers as being their time-tables, and they thereby make a public profession that they will exercise their vocation of common carriers, and dispatch passengers or goods, as the case may be, to certain specified places at or about the time named in such time-tables; and if they fail to do so they commit a breach of their duty as common carriers, and are responsible in damages to those who tender themselves or their goods for conveyance at the appointed time, and find that there is no train about to start (*c*). But the sticking up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station (*d*).

Duty of railway and canal companies to afford reasonable facilities for the carriage of passengers, merchandise, and chattels.—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) it is enacted (s. 2), that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular

(*z*) Bac. Abr. CARRIERS, A. *Lovett* v. *Hobbs*, 2 Show. 127. *Ingate* v. *Christie*, 3 C. & K. 61.

(*a*) *Brind* v. *Dale*, 8 C. & P. 207. *Ross* v. *Hill*, 2 C. B. 887; 15 Law J., C. P. 182.

(*b*) Post, ch. 12, s. 1.

(*c*) *Denton* v. *Gt. Northern Rail. Co.*, 5 Ell. & Bl. 868; 25 Law J., Q. B. 129.

(*d*) *Oxlade* v. *North-East. Rail. Co.*, 12 C. B., N. S. 350; 9 W. R. 272; 3 L. T. R., N. S. 671.

description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference, or advantage, or prejudice, or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public.

If railways are blocked up and impeded by snow the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle and goods. "If a snow-storm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense" (*e*).

Whenever there has been an apparent preference in respect of the conveyance of goods conceded by a railway company to certain persons to the prejudice of a complainant, there is sufficient to call upon the company for an explanation and justification of their conduct in the matter (*f*).

Loss of goods by common carriers.—"The law," observes Holt, C. J., "charges every person exercising the public employment of a common carrier, common hoyman, master of a ship intrusted to carry goods, against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c.; and yet doing it in such a clandestine manner

(*e*) *Briddon* v. *Gt. North. Rail. Co.*, 28 Law J., Exch. 51.

(*f*) *Garton* v. *Brist. & Ex. Rail. Co.*, 28 Law J., C. P. 306.. *Baxendale* v. *Gt. West.*, ib. 81.

as would not be possible to be discovered. And this is the reason the law is founded upon in that point" (*g*).

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, and tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods (*h*). Thus, where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with inextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action (*i*)! If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper coverings for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor (*k*).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage (*l*). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or the consignor, such as defective packing, nor for losses occasioned by an inherent defect in the article causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is to take all reasonable means to provide against the defect, and secure their safety. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards the dog slipped his head through the noose, and escaped, and was never seen afterwards, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the

(*g*) *Coggs* v. *Bernard*, Raym. 909; 1 Smith's Leadg. Cas. 92, 93.

(*h*) *Oakley* v. *Ports. &c. St. Packet Co.*, 11 Exch. 622; 25 Law J., Exch. 99.

(*i*) *Forward* v. *Pittard*, 1 T. R. 33. *Hyde* v. *Trent Nav. Co.*, 5 T. R. 399.

(*k*) Doct. & Stud. Dial. 2, ch. 38; Noy, ch. 43.

(*l*) *Dale* v. *Hall*, 1 Wils. 281.

cord was properly secured round the dog's neck, it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss (*m*).

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *primâ facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control (*n*).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third party, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus, where the ship of a common carrier by water drove on an anchor in the river Humber, and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third party in not having his buoy out to mark the place where his anchor lay, it was held that the common carrier was nevertheless bound to make good the loss (*o*).

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. If, however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire (*p*), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit (*q*).

Concealment of risk by consignors.—A person who gives a carrier goods of a dangerous character to carry, and which require more caution in their

(*m*) *Stuart* v. *Crawley*, 2 Stark. 324.
(*n*) *Hawkes* v. *Smith*, 1 Car. & M. 72.
(*o*) *Trent Nav. Co.* v. *Ward*, 3 Esp. 130.
(*p*) *Brooke* v. *Pickwick*, 4 Bing. 218.
(*q*) *Marshall* v. *York, Newc. &c. Rail. Co.*, 11 C. B. 655; 21 Law J., C. P. 24.

carriage than ordinary merchandise, and which, without such caution, would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and if he fails so to do he is responsible to the carrier, or to his servants, for the injurious consequences of his neglect (*r*).

Contributory negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has in any way conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier. If a man, for example, sends bank-notes, sovereigns, or valuables, to a common carrier to be carried disguised as merchandise, or as a parcel of ordinary value, requiring no more than ordinary care, and the valuables are stolen, the common carrier is not responsible at common law for the loss, inasmuch as the neglect of the consignor in not apprising him of the extraordinary value of the parcel, in order that extraordinary care might have been taken of it, may have been the occasion of that loss (ante, p. 16); and "the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk is a legal fraud—*dolus malus*,—and *ex dolo malo non oritur actio*" (*s*).

Inability of the common carrier to rid himself of the public duties imposed upon him.—A person who undertakes the public employment of a common carrier of merchandise, or of passengers and luggage, has no more right to engraft upon his employment the terms that "all merchandise is carried at the risk of the owners," or that "all luggage is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," than a common innkeeper has to refuse to receive guests except on the terms that he shall not be responsible for the safe-keeping of their goods and luggage deposited in his inn (post, s. 2). The consignor of merchandise or the passenger has a right to reject these terms, and to insist on the merchandise or the customary allowance of luggage for a passenger, to be taken at the common carrier's risk, provided he makes the declaration of value, and is ready to pay the premium of insurance in those cases where the declaration and payment are required by law (post, p. 397). "The traveller," justly observes an American judge, "is under a sort of moral duress, a necessity of employing the common carrier, and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a common carrier for his own benefit and a mandatary or less to his employer. He is a public servant, with certain duties defined by law, and as Ashhurst, J., said of the duties of innkeepers, they are *indelible*" (*t*).

(*r*) *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 139; post, ch. 17, s. 1, FRAUDULENT CONCEALMENT.

(*s*) Bayley, J., *Batson* v. *Donovan*, 4 B. & Ald. 37.

(*t*) Cowen, J., *Cole* v. *Goodwin*, 19 Wend. 281. *Hollister* v. *Nowlen*, ib. 234. Angell on Carriers, App. xviii. xxiii.

" If the carrier should perchance refuse to carry the stuffe, unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and against good manners, and so it is in all other cases like " (*u*).

Statutory protection of common carriers in respect of the carriage of gold and silver, title-deeds, valuables, &c.—By the statute 11 Geo. 4, and 1 Wm. 4, c. 68, commonly called the Carriers' Act, reciting that by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, and public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of common carriers for hire is greatly increased; and that through the frequent omission by persons sending such parcels to notify the value and nature of the contents thereof, so as to enable such common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is enacted, that no common carrier by land for hire shall be liable for the loss of, or injury to, any gold or silver coin, or any gold or silver in a manufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger, the *value* and *nature* of such articles or property shall have been DECLARED by the person sending or delivering the same; and the increased charge thereinafter mentioned, or an engagement to pay the same, accepted by the person receiving such parcel or package.

Of the fixing up of notices required by the statute.—And (s. 2) that when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed TEN POUNDS, it shall be lawful for such common carriers to demand

(*u*) Doct. & Stud. Dial. 2, ch. 39; Noy's Maxims, ch. 43, 92.

and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. And (s. 3) that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, the person receiving such increased rate of charge, or accepting such engagement, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (s. 4) to limit, or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier, for the receiving of parcels to be conveyed, is (s. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (s. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the act is (s. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandise; nor (s. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c. from liability for any loss or injury occasioned by his own personal neglect or misconduct.

When a declaration of value is a condition precedent to any liability on the part of the common carrier.—This act, it will be observed, applies solely to common carriers by land, and the effect of it is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10*l.*, and the value

has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not a notice or tariff of charges for the increased risk of conveyance of such articles stuck up in his office, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The act requires the person who sends the goods to take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the first section of the statute, which expressly says that the common carrier shall not be liable unless the declaration is made (*x*). As soon, however, as this has been done, the common carrier is entitled to have and to demand an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice stuck up in his office of the sums he charges above the usual rate of charge for the carriage of the articles. If there is no tariff, he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the act (*y*). The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character (*z*). And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute (*a*).

By whom the declaration of value is to be made and the increased rate of carriage paid.— In a case before Lord Ellenborough, before the passing of the Common Carriers' Act, it was held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an implied authority to do all that was necessary to be done to insure them a safe conveyance; and, therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier (*b*); but the limitation of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carriers' Act, being now established by act of parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor to pay the carriage and insure articles directed to be forwarded by

(*x*) *Pianciani* v. *Lond. & S. W. Rail. Co.*, 18 C. B. 226.

(*y*) *Baxendale* v. *Hart*, 21 Law J., Exch. 123; 6 Exch. 789.

(*z*) *Crouch* v. *Lond. & N. W.*, 14 C. B. 295; 23 Law J., C. P. 73.

(*a*) *Behrens* v. *Gt. North. Rail. Co.*, 31 Law J., Exch. 299; 30 ib. 153.

(*b*) *Clarke* v. *Hutchins*, 14 East, 476.

his customers, unless he receives express directions so to do (*c*). If, indeed, the articles are of an extremely fragile character, and likely to be damaged without great care, or, if they are of unusual value, it would be the duty of the consignor to declare their nature and value to the common carrier, that proper care might be taken of them (ante, p. 395); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them.

Articles to which the statute extends.—The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage (*d*). Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly of the wool of sheep, have been held not to be "furs" within the Common Carriers' Act (*e*), but dresses of silk made up for use are silks within the operation of the act (*f*). By the term "writings" is meant writings of value, and therefore an instrument in writing in an imperfect state, intended to secure a large sum of money, but not being a valid and complete security at the time of the loss, is not within the statute (*g*). If the contents of a parcel or package exceeding 10*l.* in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the act, the common carrier is released from all liability in respect of the former, but, as regards the latter, his common-law liability remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewellery, and trinkets, exceeding 10*l.* in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewellery and trinkets (*h*), but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express terms of the act freed from all responsibility and liability in respect of the loss thereof, if the consignee has not declared the nature and value of the article, and paid, or agreed to pay, the increased charge specified in the notice, although

(*c*) *Coshay* v. *Tute*, 3 Campb. 129. *Bailey* v. *Sweeting*, 9 C. B., N. S. 857.

(*d*) *Owen* v. *Burnett*, 2 C. & M. 353; 4 Tyr. 133. *Boys* v. *Pink*, 8 C. & P. 361.

(*e*) *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*f*) *Bernstein* v. *Baxendale*, 6 C. B., N. S. 259; 28 Law J., C. P. 265, overruling *Davey* v. *Mason*, Car. & M. 50.

(*g*) *Stoessiger* v. *S. E. R. Co.*, 23 Law J., Q. B. 293. As to pleading the act, *Smith* v. *Lond. & Br. &c. R. Co.*, 7 C. B. 789.

(*h*) *Bernstein* v. *Baxendale*, 28 Law J., C. P. 265.

the loss may have been occasioned by the grossest negligence (*i*). If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained (*k*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the extended customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own terms" (*l*). And if, after the declaration has been made, the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute (*m*).

Losses covered by the statute.—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery, whereby the use of the chattel, or the means of turning it to advantage, were lost (*n*).

Loss of goods from theft by the common carrier's servants.—Nothing contained in the Carriers' Act is, as we have seen (s. 8), to protect any common carrier for hire from liability to answer for loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's employ. If, therefore, the common carrier relies upon the statute as a defence, contending that there ought to have been, and that there was not, any declaration of value on the part of the consignor, of the article alleged to have been lost, the defence is rebutted, and the case taken out of the operation of the statute, by showing that the loss arose from the felonious act of the carrier's servant (*o*).

(*i*) *Hinton* v. *Dibbin*, 2 Q. B. 646.
(*k*) *Wyld* v. *Pickford*, 8 M. & W. 462.
(*l*) Ib. 458.
(*m*) *Behrens* v. *Gt. North. Rail. Co.*, 6 H. & N. 366; 30 Law J., Exch. 153.
(*n*) *Hearn* v. *Lond. & S. W. R. Co.*, 10 Exch. 801; 24 Law J., Exch. 180.
(*o*) *Metcalfe* v. *Lond. & Br. Rail. Co.*, 4 C. B., N. S. 307; 27 Law J., C. P. 205.

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of 10*l.*, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff or scale of charge, and the common carrier afterwards accepts a parcel to be carried, knowing it to be worth more than 10*l.*, without demanding or receiving the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft (*p*). Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft is *primâ facie* proof of negligent keeping, but it is not absolutely conclusive, and the special carrier may exonerate himself from liability for the theft by proving his own care and watchfulness, and showing that there was no want of any proper precaution on his part to guard against theft by his servants. "If the consignor," observes Lord Tenterden, "has concealed the value of the parcel from the carrier, and has adopted a disguise for it likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss" (*q*).

All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other parties, receiving wages from them and not from the carrier (*r*).

Inability of railway and canal companies to exonerate themselves from liability for their own neglect, default, or breach of duty by notice, condition, or declaration.—By s: 7 of the Railway and Canal and Traffic Act (17 & 18 Vict. c. 31), every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering

(*p*) *Butt* v. *Gt. West. Rail. Co.*, 11 C. B. 140. *Gt. West. Rail. Co.* v. *Rimell*, 27 Law J., C. P. 204.

(*q*) *Bradley* v. *Waterhouse*, 1 M. & M. 154.

(*r*) *Machu* v. *Lond. & S. W. R. Co.*, 2 Exch. 426.

of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable (*s*).

This statute does not enable railway companies to frame such regulations and make such conditions with respect to the receiving and forwarding of goods and chattels as will enable them substantially to escape from their common law or statutory liability to carry passengers' luggage, and such things as they ordinarily profess to carry; but they may attach reasonable conditions to the receiving, forwarding, and delivering them; and then, if those reasonable conditions are not assented to and signed, they may refuse to carry.

Where an act of parliament authorised a railway company to make regulations respecting passengers' luggage, and the company, by their regulations, required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage-van some wearing apparel wrapped in a shawl, and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common-law liability to receive and carry the article as luggage (*t*).

In cases where railway companies under the Carriers' Act, or the Railway Traffic Act, are entitled to demand an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common-law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default (*u*).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability from loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods (*x*).

Signature of notices, conditions, declarations, and special contracts.—By

(*s*) As to the construction of this section, see *Peek* v. *North Staff. Rail. Co.*, 8 L. T. R., N. S. 770.

(*t*) *Munster* v. *S. E. Rail. Co.*, 4 C. B., N. S. 676; 27 Law J., C. P. 312.

(*u*) *Peek* v. *North Staff. Rail. Co.*, 8 Law T. R., N. S. 768; 27 Law J., Q. B. 470.

(*x*) *Phillips* v. *Clark*, 26 Law J., 168; 2 C. B., N. S. 163. *M'Manus* v. *Lanc. & York, &c. Rail. Co.*, 4 H. & N. 327; 28 Law J., Exch. 353.

s. 7 of the Railway and Canal Traffic Act it is further enacted, that no special contract between a railway and canal company and any other parties, respecting the receiving, forwarding, or delivering of any animals, articles, goods or things, as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively, for carriage.

Before the statute, every case in which a special limited liability was substituted for the general common-law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition, and declaration, under the statute, however reasonable, must be made in writing, and be signed in the mode provided by the statute, in order to be binding in law upon the party sought to be affected by it (*y*). If a man has an opportunity of reading the conditions, and chooses to sign them without reading them, he is nevertheless bound by them, if they are reasonable (*z*).

What are just and reasonable conditions respecting the receiving, forwarding, and delivering goods.—The reasonableness or unreasonableness of the condition made by the company with respect to the receiving, forwarding, and delivering goods and chattels, will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms (*a*).

Every stipulation or condition professing to exempt a railway company or canal company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable. "It is impossible," justly observes Lord Ellenborough, "without outraging common sense, to allow carriers to say, 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious'" (*b*).

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket

(*y*) *M'Manus* v. *Lanc. & York Rail. Co.*, *Peek* v. *North Staff. Rail. Co.*, ut sup. *Simons* v. *Gt. West. Rail. Co.*, 18 C. B. 826; 26 Law J., C. P. 25. *Beal* v. *South Dev. Rail. Co.*, 5 H. & N. 886.

(*z*) *Lewis* v. *Gt. West. Rail. Co.*, 5 H. & N. 874; 29 Law J., Exch. 425.

(*a*) *Pardington* v. *South Wales Rail. Co.*, 1 H. & N. 396. *Simons* v. *Gt. West. Rail. Co.*, 18 C. B. 805. *Garton* v. *Brist. & Ex. Rail. Co.*, 1 El. B. & El. 112; 30 Law J., Q. B. 273. As to what is a reasonable per-centage charge on declared value, see *Harrison* v. *Lond. Br. & S. C. Rail. Co.*, 31 Law J., Q. B. 113.

(*b*) *Lyon* v. *Mells*, 5 East, 438. Ld. Wensleydale, *Peek* v. *North Staff. Rail. Co.*, 32 Law J., Q. B. 8 L. T. R., N. S. 770; and see ante, p. 395.

containing a memorandum to the effect that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendant's servants provided a truck which, in external appearance, and so far as the defendant's servants knew, was sound, and sufficient for the conveyance of the horses, but it was in fact unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured; it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse. "We are of opinion," observes the court, "that the condition or special contract in this case is not just and reasonable. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned, not only by all risks of whatever kind directly incidental to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the companies are to carry is a matter, generally speaking, which they, and they alone, have the means of fully ascertaining; and it would be unreasonable and mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured" (*c*).

The court is bound to look at the particular matter in each case to see whether the condition is reasonable or not; and it has been held that a condition which seeks to relieve a railway company from the consequences of the loss or non-delivery of goods, by reason of insufficient or improper package, is not reasonable (*d*); and if the condition is framed without limitation or exception, so as to exempt the company from all responsibility for injury, however caused, it will be void, as being neither just nor reasonable (*e*).

(*c*) *M'Manus* v. *Lanc. & York, &c. Rail. Co.*, ante, p. 402. *M'Cance* v. *Lond. & North-West. Rail. Co.*, 7 H. & N. 477; 31 Law J., Exch. 65.

(*d*) *Simons* v. *Gt. West. Rail. Co.*, 18 C. B. 830; 26 Law J., C. P. 25. Ld. Wensleydale, *Peek* v. *North Staff. &c.*, 8 L. T. R., N. S. 772.

(*e*) *Peek* v. *North Staff. Rail. Co.*, 8 L. T. R., N. S. 768; 10 H. L. C.

Commencement and duration of the liability—Damage or loss of goods in warehouses.—When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire (*f*). But if the destination is marked out, and he has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law (*g*). Whenever the common carrier receives goods to be kept until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire and not as a gratuitous bailee, although he does not charge warehouse rent (*h*). Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire (*i*).

Delivery of goods at the place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition (*k*), and deliver them into the hands of the consignee, or of some person expressly or impliedly authorised by him to receive them; and he must of course, in all cases, take especial care that they are delivered into the hands of the right person (*l*). When the carriage is by land, the goods must be sent to the residence of the consignee; for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the road-side at which the coach usually stops, unless he has received directions from the consignee so to do (*m*). If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound, as we have already seen, to part with the possession of the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them

(*f*) *Cairns* v. *Robins*, 8 M. & W. 263. *Garside* v. *Trent Nav. Co.*, 4 T. R. 582.

(*g*) *Forward* v. *Pittard*, 1 T. R. 27; Buller, J., 5 T. R. 398. As to accidental fires in warehouses, see 6 Anne, c. 31, s. 6, made perpetual by 10 Anne, c. 14, s. 1; ante, p. 208.

(*h*) *White* v. *Humphrey*, 12 Jur. Q. B. 417.

(*i*) *Van Toll* v. *S. E. R. Rail. Co.*, 31 Law J., C. P. 241.

(*k*) *Raphael* v. *Pickford*, 6 Sc. N. R. 478; 2 Dowl. N. S. 916. *Black* v. *Baxendale*, 1 Exch. 410; 17 Law J., Exch. 50.

(*l*) *Golden* v. *Manning*, 3 Wils. 433; 2 W. Bl. 916. *Birket* v. *Willan*, 2 B. & Ald. 356. *Duff* v. *Budd*, 6 Moore, 469. *Stephenson* v. *Hart*, 1 M. & P. 357; 4 Bing. 476.

(*m*) *Lond. & North-West. Rail. Co.* v. *Bartlett*, 7 H. & N. 400; 31 Law J., Exch. 92.

thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee (*n*). And if the consignee, having no warehouse of his own, asks him to keep the goods until he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his care and custody of them (*o*). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss (*p*).

Delivery of luggage at railway stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (*q*).

Acceptance of goods and passengers to be carried beyond the limits of the ordinary destination.—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another

(*n*) *Storr* v. *Crowley*, M'Clel. & Y. 136.

(*o*) *In re Webb*, 8 Taunt. 449; 6 Moore, 500.

(*p*) *Bourne* v. *Gatliffe*, 3 Sc. N. R. 1; 8 ib. 604; 7 M. & Gr. 850. *Syeds* v. *Hay*, 4 T. R. 260. *Wardell* v. *Mourillyan*, 2 Esp. 693.

(*q*) *Richards* v. *Lond. & Br. &c. Rail. Co.*, 7 C. B. 839; 18 Law J., C. P. 251. *Butcher* v. *Lond. & S. W. Rail. Co.*, 16 C. B. 13.

conveyance (*r*). If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them (*s*), unless the company has by express contract limited its liability to loss and damage occurring on its own line of railway (*t*).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods (*u*). The same principle applies to the conveyance of passengers (*x*).

Loss of passengers' luggage by railway companies.—Most of the railway acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him articles of clothing of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. Articles of clothing in the act of parliament mean such things as a man generally requires and takes with him, and are ordinarily used by travellers, and may extend to a dressing-case. A railway company has no power to make a by-law abridging the rights of passengers in respect of their luggage, and, therefore, where the Great Western Railway Company made a by-law to the effect that they would "not be responsible for the care of luggage unless booked and paid for," it was held that the by-law was null and void (*y*).

Railway companies are responsible for the acts and omissions of their

(*r*) *Garnett* v. *Willan*, 5 B. & Ald. 53.

(*s*) *Muschamp* v. *Lanc. & Prest. Rail. Co.*, 8 M. & W. 421. *Watson* v. *Ambergate Rail. Co.*, 15 Jur. 448. *Collins* v. *Brist. & Ex. Rail. Co.*, 11 Exch. 790; 25 Law J., Exch. 185. *Brist. & Ex. Rail. Co.* v. *Collins*, 7 H. L. C. 234. *Wilby* v. *West Corn. Rail. Co.*, 2 H. & N. 709. *Scothorn* v. *South Staff. Rail. Co.*, 8 Exch. 345. *Mytton* v. *Mid. Rail. Co.*, 4 H. & N. 615. *Coxen* v. *Gt. West. R. Co.*, 5 H. & N. 274; 29 Law J., Exch. 165. *Hayes* v. *S. W. Rail. Co.*, 9 Ir. C. L. R. 474.

(*t*) *Fowles* v. *Gt. Western, &c.*, 7 Exch. 699; 22 Law J., Exch. 76.

(*u*) *Crouch* v. *Gt. West. Rail. Co.*, 26 Law J., Exch. 345; 6 W. R. 391. *Scothorn* v. *South Staff. Rail. Co.*, 8 Ex. 345.

(*x*) *Blake* v. *Gt. West. Rail. Co.*, 7 H. & N. 987; 31 Law J., Exch. 346.

(*y*) *Williams* v. *Gt. West. Rail. Co.*, 10 Exch. 15. *Gt. Western, &c.* v. *Goodman*, 12 C. B. 313; 21 Law J., C. P. 197. *Munster* v. *S. E. R. Rail. Co.*, 4 C. B., N. S. 698; 27 Law J., C. P. 312.

porters in the management and delivery of passengers' luggage, and are responsible for its safe delivery into the hands of the passenger, or into those of his appointed agent or servant, on the termination of the journey. If it is the usual course to deliver the luggage of passengers at a particular part of the platform, the company is bound to deliver it there. If a railway porter, at the request of a passenger, calls a cab, and places the passenger's luggage on a cab, and there leaves it, and comes away without having the means of identifying the vehicle, and the cab-driver goes off with the luggage before the passenger has taken his seat in the vehicle, the railway company will be responsible for the loss (*z*). If the luggage of a passenger is, with the knowledge of the servants of the company and with their assent, placed in the carriage in which the passenger sits, the luggage is, in point of law, in the custody of the company, so as to render them responsible for its loss, unless the loss appears to have been occasioned by some misconduct or carelessness of the passenger himself in dealing with such luggage (*a*).

Some of the special acts of parliament incorporating railway companies appear to have the monstrous and unreasonable provision, that every passenger travelling on the railway shall take his luggage at his own risk (*b*).

Loss of merchandise carried as luggage.—If a party packs merchandise in carpet-bags and portmanteaus, and passes it off upon a railway company as personal luggage which he is entitled to have carried gratis, he commits a fraud upon the company, and cannot recover for the loss of it; but if the company have express notice that what the passenger takes with him is merchandise, and the company think fit to carry it without demanding any extra remuneration, they will be responsible for the loss of it (*c*).

Limitation of the liability of shipowners.—The Merchant Shipping Acts regulate and control, as we have seen (ante, p. 363), the liability of owners of sea-going ships, or of shares therein, in respect of loss of or damage to goods.

Refusal of the consignee to receive the goods—Liability of the carrier as bailee.—If the consignee refuses to receive the goods, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. If the party to whom they are addressed is not

(*z*) *Butcher* v. *Lond. & S. W. Rail. Co.*, 16 C. B. 13; 24 Law J., C. P. 137. *Richards* v. *Lond. Br. & S. C. Rail. Co.*, 7 C. B. 839.

(*a*) *Gt. Northern Rail. Co.* v. *Shepherd*, 8 Exch. 30; 21 Law J., Exch. 114. *Robinson* v. *Dunmore*, 2 B. & P. 416.

(*b*) *Mytton* v. *Mid. Rail. Co.*, 4 H. & N. 621.

(*c*) *Gt. North. Rail. Co.* v. *Shepherd*, ut sup. *Cahill* v. *Lond. & North-West. Rail. Co.*, 18 C. B., N. S. 818; 31 Law J., C. P. 271; 30 ib. 289. *Belfast & Ballymena Rail. Co.* v. *Keys*, 8 Jur. N. S. (H. L.) 369.

ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property (*d*). If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected (*e*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came (*f*).

Landing of goods by shipowners where the consignee fails to take them away, is provided for by the Merchant Shipping Acts, in cases where the goods are imported from foreign parts (*g*).

Lien of common carriers.— The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner finding them in the possession of the carrier demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, "for when the robber brought them to him he was obliged to receive them and carry them, and therefore, since the law compelled him to carry them, it will give him remedy by retainer for the price of the carriage" (*h*).

But the carrier has no right of lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be holden as a security for the payment of such debts, as well as for the payment of the price of their own carriage (*i*). But the common carrier has no right to

(*d*) *Ransom* v. *East. Coy's. Rail. Co.*, 26 Law J., Exch. 345.

(*e*) *Hudson* v. *Baxendale*, 27 Law J., Exch. 93.

(*f*) *Gt. West. Rail. Co.* v. *Crouch*, 3 H. & N. 196; 27 Law J., Exch. 345.

(*g*) 25 & 26 Vict. c. 63, s. 67.

(*h*) *Exeter Carriers'* case, Ld. Raym. 867.

(*i*) *Wright* v. *Snell*, 5 B. & Ald. 353.

make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, of no force or effect in the eye of the law (*k*).

If a person goes to a coach-office and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will have a lien upon the portmanteau for his reasonable and customary remuneration and charge in such cases, but not for the full amount of the coach fare. If the party merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all (*l*). When goods delivered to be carried are received from the waggon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse-room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof (*m*). A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the price of the carriage of the passenger as well as of his effects, but he has of course no right to detain the person of the passenger or the clothes he is actually wearing (*n*). And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered (*o*).

Railway charges must be equal and reasonable, and no undue preference given to one person or class of persons over another. If overcharges are made they may be recovered back (*p*).

Charges for packed parcels.— It is unreasonable to make different rates of charge to different persons for parcels, whether they be packed parcels or not (*q*). In some cases deciding that an extra charge may be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not

(*k*) *Butler* v. *Woolcott*, 2 N. R., 5 B. & P. 64. *Oppenheim* v. *Russell*, 3 B. & P. 47. *Rushforth* v. *Hadfield*, 6 East, 527; 7 ib. 227.

(*l*) *Higgins* v. *Bretherton*, 5 C. & P. 2.

(*m*) *Lambert* v. *Robinson*, 1 Esp. 119.

(*n*) *Wolf* v. *Summers*, 2 Campb. 631.

(*o*) *Wallace* v. *Woodgate*, R. & M. 194.

(*p*) *Pegler* v. *Monm. &c. Rail. Co.*, 6 H. & N. 644. *Garton* v. *Brist. & Ex. R. Co.*, 30 Law J., Q. B. 273.

(*q*) *Garton* v. *Brist. & Ex. Rail. Co.*, 4 H. & N. 49; 28 Law J., Ex. 169. *Baxendale* v. *Gt. West. Rail. Co.*, 8 L. T. R., N. S. 833.

carriers, for what they called inclosures, which were in reality packed parcels, and the courts have held that an extra charge for a packed parcel to a carrier was against the statutes, imposing upon railway companies the duty of charging equally to all persons in respect of all goods of a like description (*r*); but the company has a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make, and to make different charges for the different classes (*s*).

Passenger fares — Right of a passenger to alight at intermediate stations. — Where a railway company, under the influence of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a by-law, subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the by-law was wholly inapplicable; that the passenger had paid his fare; and that the company had no right to prevent him from getting down at any intermediate station (*t*).

Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe and secure ferry-boats, and safe slips and landing-stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage and merchandise. Where, therefore, the defendants, as ferrymen, used steamboats for transit across the river Mersey, from which passengers and animals could not safely land without landing-stages and slips, and they provided an insecure handrail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss (*u*).

Loss of goods by common ferrymen and common hoymen.— Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, or tempest, and inevitable accident (*x*). In *Mouse's* case it was resolved, "that if the ferryman surcharge the barge, it is lawful for any of the passengers in time of accident and necessity to cast the things out of the barge for safety of the lives of the passengers; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by

(*r*) *Parker* v. *Gt. West. Rail. Co.*, 11 C. B. 545. *Crouch* v. *Gt. North. R. Co.*, 11 Exch. 742; 25 Law J., Exch. 137. And see Addison on Contracts, 5th ed. p. 502.

(*s*) Erle, J., *Branly* v. *S. E. R. Rail. Co.*, 12 C. B., N. S. 63; 31 Law J., C. P. 290.

(*t*) *Reg.* v. *Frere*, 4 Ell. & Bl. 598.

(*u*) *Willoughby* v. *Horridge*, 12 C. B. 751; 22 Law J., C. P. 90.

(*x*) *Amies* v. *Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B. *Oakley* v. *Ports. &c. St. Packet Co.*, ante, p. 393.

tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for 'interest reipublicæ quod homines conserventur'" (*y*).

SECTION II.

NEGLIGENCE OF COMMON INNKEEPERS AND LODGING-HOUSE KEEPERS.

Of the duty of common innkeepers to provide food and shelter for travellers and wayfarers.—Every man who opens an inn by the wayside, and professes to exercise the business and employment of a common innkeeper, is, by the custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers (*z*) who apply for it, and tender, or are able and ready to pay, the customary hire, and are not drunk or disorderly, or labouring under contagious or infectious diseases; and if he neglects or refuses so to do, he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal; and also to an indictment at common law (*a*). The innkeeper is bound, moreover, to receive and provide for the horses of all travellers who alight at his inn, if he has room in his stables; even, it is said, of those who choose only to put up their horses, resorting elsewhere for lodging and entertainment. But he is not bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest (*b*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests; and if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere (*c*).

The extent of the public duty and obligation of the innkeeper depends upon the nature of his public profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of unusual, extraordinary, and inconvenient bulk, nor goods which do not accompany the person of the guest (*d*).

(*y*) *Mouse's* case, 12 Co. 63.
(*z*) *Taylor* v. *Humphreys*, 30 Law J., M. C. 242.
(*a*) *Hawthorn* v. *Hammond*, 1 C. & K. 404. *Howell* v. *Jackson*, 6 C. & P. 725. *Rex* v. *Ivens*, 7 C. & P. 219.
(*b*) *Saunders* v. *Plummer*, Orl. Bridg. 227.
(*c*) *Fell* v. *Knight*, 8 M. & W. 276.
(*d*) *Broadwood* v. *Granara*, 10 Exch. 423; 24 Law J., Exch. 1.

The innkeeper cannot discharge himself of the duty and burthen imposed upon him by the common law by express notice to his guests (*e*), or under pretence of sickness, want of understanding, or absence from home (*f*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom (*g*).

Who may be said to be a common innkeeper.—"Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses, and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not" (*h*). A London "coffee-house," where beds and provisions are furnished by the day or for the night, or for a longer period, to persons in certain stations of life, who may think fit to apply for them, is a common inn (*i*). But if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper (*k*). And if he professes to let only private lodgings, and does not offer his house to the public as a place of reception, and entertainment, and lodging, for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Duty of the innkeeper to protect his guest from robbery and theft.—It has been justly observed by the civilians, that the common wants and necessities of mankind compel men to trust valuable property to the keepers of public inns, who have frequent opportunities of combining and colluding with thieves, to the prejudice of those who trust them; and it was thought right in the Roman law to deprive such persons of the temptation to do wrong, and to compel them to be honest by making them responsible for the safety of goods intrusted to their keeping. By a public edict of the Roman prætor it was ordained, that if shipmasters and carriers, innkeepers and stablekeepers, did not restore what they had received to keep SAFE, he would give judgment against them (*l*).

The construction put upon this edict was, not that the shipmaster, carrier, or innkeeper was bound to deliver the goods safe at all events; but that he was bound to deliver them, unless prevented by a *fatale damnum*, or a loss by what was termed the decree of fate, or order of destiny, such as a loss by lightning, or an earthquake, or a sudden

(*e*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 Law J., Exch. 131.

(*f*) Bac. Abr. INNS, C 4.

(*g*) *Cross* v. *Andrées*, Roll. Abr. 2; Carth. 101.

(*h*) Bac. Abr. INNS, B. *Parker* v. *Flint*, 12 Mod. 255.

(*i*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

(*k*) *Doe* v. *Laming*, 4 Campb. 77.

(*l*) "Ait Prætor; NAUTÆ, CAUPONES, STABULARII, QUOD CUJUSQUE SALVUM FORE RECEPERINT NISI RESTITUUNT IN EOS JUDICIUM DABO."—Dig. lib. 4, tit. 9. "Maxima est utilitas hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere . . . . . et nisi hoc esset statutum materia daretur cum furibus adversus eos quos recipiunt, coeundi."—Dig. lib. 4, tit. 9, s. 1.

inundation that could not have been foreseen, and that no human care or skill could have provided against or avoided; or an irresistible attack by pirates and hostile forces, the enemies of the state. The spirit of this edict has been universally adopted by the jurisprudence of continental Europe, and was introduced at an early period into our common law.

The original writ against an hostler or innkeeper for the loss of the goods of his guest declares that "secundum legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia communia tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione, seu amissione, custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo" (*m*).

From the terms of this writ, which is the foundation of the common law concerning hostlers, it was resolved in Calye's case (*n*):—

"1. That the lodging ought to be a common inn: for if a man be lodged, at his request, with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it, for the words are, 'hospitatores qui communia hospitia tenent.' And so are the books, &c. And the plaintiff ought to declare that the defendant keeps 'commune hospitium.'

"2. That it appears from the words of the writ, that common inns are instituted for passengers and wayfaring men, and therefore if a neighbour, who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods be stolen, &c., he shall not have an action, for the writ is, 'ad hospitandos homines,' &c., 'transeuntes, et in eisdem hospitantes,' &c.

"3. That the words 'eorum bona et catalla infra hospitia illa existentia' show that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are 'infra hospitium,' and the books agree that the innholder is bound to answer for himself and for his family of the chambers and stables, for they are 'infra hospitium;' and that if an innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him; but that if the owner doth not require it, but the innholder, of his own head, puts his guest's horse to grass, he shall answer for him if he be stolen.

"4. That the words 'pro defectu hospitatorum seu servientium suorum' show that the innholder shall not be charged, unless there be a default in him, or his servants, in the well and safe-keeping and custody of their guests' goods and chattels within his common inn, for the innkeeper is bound in law to keep them safe, without any stealing or purloining; and

(*m*) Reg. Br. F. N. B. 94, a. b. (*n*) 8 Co. 32; 1 Smith's L. C. 87.

it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber-door open, but he ought to keep the goods and chattels of his guest there in safety. And although the guest doth not deliver his goods to the inn-holder to keep, nor acquaints him with them, yet if they be carried away or stolen the innkeeper shall be charged, although they who stole or carried away the goods be unknown. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for there the fault is in the guest to have such a companion or servant. But if the innkeeper appoints one to lodge with him, he shall answer for him. If the innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest.

"5. That although the words 'bona et catalla' do not of their proper nature extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; and, therefore, if one brings a bag or chest, &c. of evidences into the inn, or obligations, deeds, or other specialties, and, by default of the innkeeper, they are taken away, the innkeeper shall answer for them; but the words, 'bona et catalla' extend only to moveables, and, therefore, if the guest be beaten in the inn, the innkeeper shall not answer for it. These words aforesaid extend to all moveable goods, although of them felony cannot be committed" (*o*).

Where a guest laid a reticule containing money on her bed, and afterwards went into her sitting-room, the door of which was opposite the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterwards be found, it was held that the innkeeper was bound to make good the loss (*p*).

A traveller went to an inn, taking with him divers packages of silk, some of which were taken up-stairs to his bed-room, and others were, by his directions, carried into the commercial room, into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bed-rooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a

(*o*) *Calye's* case, 8 Co. 32. (*p*) *Kent* v. *Shuckard*, 2 B. & Ad. 803.

place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held, that if the innkeeper had intended not to be responsible for goods deposited by the guests in the commercial room, he should have declared his intention to them at the time the goods were placed there (*q*). But if the guest is guilty of gross negligence in leaving a box containing money or bank-notes in the commercial room, after having opened it and exposed the contents to the bystanders, he cannot, if the money is stolen, charge the innkeeper with the loss (*r*).

A servant having been sent with goods to market, and being unable to sell them, went to an inn, and asked if he could leave the goods there until next market-day. The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again the goods were gone, and were never afterwards seen or heard of, and it was held that the innkeeper was responsible for the loss (*s*). But "if a guest come to a common innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged" (*t*). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss (*u*). "I agree," observes Lord Ellenborough, "in what is stated in Calye's case, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for the jury, whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room" (*x*).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants the latter cannot, of course, discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken. Where the plaintiff, a farmer, drove his horse and gig to an inn on a market-day, and the hostler

(*q*) *Richmond* v. *Smith*, 8 B. & C. 9.
(*r*) *Armistead* v. *White* or *Wilde*, 20 Law J., Q. B. 524; 17 Q. B. 261.
(*s*) *Bennet* v. *Mellor*, 5 T. R. 276.
(*t*) *White's* case, Dyer, 158b.
(*u*) *Farnworth* v. *Packwood*, 1 Stark. 249.
(*x*) 4 M. & S. 310; 1 Stark. 252, n.

took the horse out of the gig and put him into a stable, and then placed the gig outside of the inn-yard, in a part of the open street where the innkeeper was in the habit of placing the carriages of his guests on fair-days, and the gig was stolen therefrom by some person unknown, it was held that the innkeeper was responsible for the loss (*y*). And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself (*z*). This extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (ante, p. 208), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses (*a*).

Limitation by statute of the liability of innkeepers.—By 26 & 27 Vict. c. 41, s. 1, it is enacted, that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of THIRTY POUNDS; except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

Obligation of innkeepers to receive property of guests for safe custody.—If any innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of such innkeeper, is unable to deposit such goods or property as are mentioned in the act, the innkeeper will not be entitled (s. 2) to the benefit of the act in respect of such goods or property. In the case of a deposit for safe custody, the innkeeper may require (s. 1), as a condition of his liability, that the goods or property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

Every innkeeper is required (s. 3) to cause at least one copy of the first section of the act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the act in respect of such goods or property only as shall be brought to his inn while such copy shall be exhibited. By the interpretation clause (s. 4) it is declared, that "the word inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law

(*y*) *Jones* v. *Tyler*, 1 Ad. & E. 522; 3 N. & M. 576.

(*z*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*a*) *Dawson* v. *Chamney*, 5 Q. B. 105, explained and qualified by *Morgan* v. *Ravey*, 30 Law J., Exch. 134.

responsible for the goods and property of his guests, and the word 'innkeeper' shall mean the keeper of any such place."

Losses occasioned by the misconduct of the guest.—If a guest at an inn asks for a private room for the purpose of exhibiting goods for sale, and receives customers, and invites the admission of strangers into the inn, upon whose ingress and egress the innkeeper has no check, the latter is not responsible for the safety of the goods in the room so used (*b*). And if the guest is himself guilty of negligence in leaving money and valuables about in rooms of common resort, he cannot, if the money and valuables are stolen, charge the innkeeper with the loss (*c*).

The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances (*d*).

Who are guests and travellers.—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep (*e*). It has been said, however, that a man may become "a guest by leaving his horse as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing" (*f*). "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller."

The length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or vary the common-law liability of the innkeeper. Thus, "If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register" (*g*). But if a man takes

(*b*) *Burgess* v. *Clements*, 1 Stark. 251, n.; 4 M. & S. 306.

(*c*) *Armistead* v. *White*, 20 Law J., Q. B. 524; 17 Q. B. 261. *Sanders* v. *Spencer*, Dyer, 266a; ante, p. 415.

(*d*) *Cashill* v. *Wright*, 6 Ell. & Bl. 900.

(*e*) *Gelley* v. *Clerk*, Cro. Jac. 188. *Smith* v. *Dearlove*, 6 C. B. 132.

(*f*) *York* v. *Grindstone*, 1 Salk. 388. *Bather* v. *Day*, 32 Law J., Exch. 171.

(*g*) Bac. Abr. INNS, C 5.

apartments in an inn for a term, by the week, month, or year; for example, or if he resides in the inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller, but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper (*h*). Holt, C. J., is reported to have held, "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there" (*i*).

Lien of innkeepers.— As the law imposes upon the common innkeeper the burthen of receiving and taking care of the goods and chattels of all travellers and guests who alight at, and take up their abode within, the inn, it gives him a right to retain such goods and chattels as a pledge for the payment of the reckoning of the guest. If a horse or carriage is put up in the stables of the inn by a guest, the innkeeper has a lien on the horse for its keep, and on the carriage for its standing-room, whether the horse or the carriage be the property of the guest or of some third party, from whom it has been fraudulently taken or stolen, unless the innkeeper knew at the time he received the guest that he was not the true owner of the horse or the carriage (*j*). But if the property does not accompany the person of the guest when he comes to the inn, but is afterwards brought there for the use of the guest, and is known by the innkeeper to be the property of another at the time it is brought to the inn, the innkeeper cannot set up any lien upon it for the debt due from his guest (*k*). He has no lien upon an animal put into his stable unless it be brought by a guest (*l*). The innkeeper has no right to take a parcel or other property out of the hands of the guest, nor can he detain the property of the guest if he has previously agreed to give the latter credit for his entertainment; nor can the innkeeper detain goods as a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the stat. 11 & 12 Wm. 3, c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied with; nor can he detain any goods not received by him in his character of innkeeper, and not brought to the inn by a person who is received and lodged in the inn as a guest (*m*).

(*h*) Warburton, J., *Watbroke* v. *Griffith*, Moore, 877. *Grinston* v. *Innkeeper*, Hetl. 49.

(*i*) *Parker* v. *Flint*, 12 Mod. 255.

(*j*) *York* v. *Greenaugh*, 2 Raym. 866. *Skipwith* v. ——, 1 Bulst. 170. *Johnson* v. *Hill*, 3 Stark. 172. *Turrill* v. *Crawley*, 13 Q. B. 197; 18 Law J., Q. B. 155. *Snead* v. *Watkins*, 1 C. B., N. S. 267; 26 Law J., C. P. 57. Ency. du Dr. (AUBERGE), 25.

(*k*) *Broadwood* v. *Granara*, 10 Exch. 422; 24 Law J., Exch. 1.

(*l*) *Binns* v. *Pigot*, 9 C. & P. 209.

(*m*) *Sunbolf* v. *Alford*, 3 M. & W. 248. *Smith* v. *Dearlove*, 6 C. B. 132; 17 Law J., C. P. 219; 12 Jur. 377.

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows the guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former (*n*). And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid (*o*). If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise (*p*). However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made (*q*).

Detention of the person of the guest.—It was thought at one time that the law accorded to the common innkeeper the right or privilege of detaining the person of a guest who had eaten food in the inn, until he had received payment of his reckoning (*r*); but this is said to have been a vulgar error, founded on the dictum of a single judge, and has been overruled, as it would arm the innkeeper with the power of detaining a man perhaps for life, without any legal process or adjudication in the matter (*s*).

Liability of lodging-house keepers.—We have seen, by the first resolution in Calye's case (ante, p. 414), it was holden, "that if a man be lodged with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him or any other, he shall not answer for it." But it is the duty of every lodging-house keeper to take such care of his house as every prudent householder might be expected to take, and to be careful in the choice of his servants. If articles belonging to the lodger are actually placed in his hands, he will be responsible, like any other bailee (ante, p. 353), for the loss of them; but he is not a bailee of them merely by reason of their having accompanied the person of the lodger and been placed in his house by the latter. The law is, that the lodger must take care of his own goods in his lodgings (*t*).

(*n*) *Jones* v. *Thurloe*, 8 Mod. 173. *Jones* v. *Pearle*, Str. 556, 557.
(*o*) *Moss* v. *Townsend*, 1 Bulstr. 207.
(*p*) *Ross* v. *Bramsteed*, 2 Ro. 438.
(*q*) *Allen* v. *Smith*, 12 C. B., N. S. 638; 31 Law J., C. P. 306.
(*r*) Bac. Abr. INNS, D.
(*s*) *Sunbolf* v. *Alford*, 3 M. & W. 254.
(*t*) *Holder* v. *Soulby*, 8 C. B., N. S. 254; 29 Law J., C. P. 246. *Dansey* v. *Richardson*, 3 Ell. & Bl. 144; 23 Law J., Q. B. 223.

SECTION III.

REMEDIES AGAINST COMMON CARRIERS AND COMMON INNKEEPERS FOR NEGLIGENCE AND BREACH OF DUTY.

Summary proceedings against railway and canal companies.—Persons complaining against railway or canal companies for not affording reasonable facilities for receiving, forwarding, and delivering traffic upon and from the several railways and canals belonging to and worked by such companies, or of anything done, or omitted to be done, in contravention of the Railway and Canal Traffic Act (ante, p. 401), may obtain relief by summary application to the Court of Common Pleas, or to any judge of such court, by motion or summons (*u*).

Parties to be made plaintiffs in actions against carriers.—The action against a carrier for the loss of goods intrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods, as the party damnified.

Where goods have been delivered to a carrier to be carried to a person designated by the consignor, the consignee is *primâ facie* the owner of the goods, and the person to whom the carrier is responsible for their safe conveyance. This is generally the case when goods are delivered to a carrier to be conveyed to a purchaser in fulfilment of a contract of sale, for as soon as the goods are delivered to the carrier they become the property of the purchaser; so that if they are lost, the purchaser, and not the vendor, must sue for the loss of them (*x*). But if they are not delivered to the carrier in execution of a contract of sale, but by the consignor and owner to be conveyed to his servant in the country, then the consignor, and not the consignee, would be the proper party to sue for the loss of them. So, if from fraud or non-compliance with the Statute of Frauds, no actual sale has taken place, and no interest in the goods has vested in the consignee, by reason of the delivery to the carrier, then the consignor is the proper person to sue for the loss of the goods (*y*).

Where the consignor had delivered goods to a carrier, in obedience to a fictitious order, which professed to come from a well-known tradesman of respectability, but had in reality been sent by a swindler, it was held that as no *bonâ-fide* sale had taken place, the consignor had not been divested of his property in the goods, and that he was, therefore, the proper party to sue the carrier for a neglect of duty in delivering them to

(*u*) 17 & 18 Vict. c. 31, ss. 3–6.

(*x*) *Dawes* v. *Peck*, 8 T. R. 332. *Coombs* v. *Brist. & Ex. Rail. Co.*, 27 Law J., Exch. 269, 402; 3 H. & N. 510.

(*y*) *Coats* v. *Chaplin*, 3 Q. B. 489. Addison on Contracts, p. 503, 5th edit.

the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were addressed (*z*). But when the carrier, in consideration of a sum of money paid, or agreed to be paid, by the consignor, as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier, upon such special contract, to say that he is not the owner of the goods. In such a case the action may be brought either by the consignor or by the consignee (*a*).

Where a laundress, residing at Hammersmith, was in the habit of employing a carrier to convey the linen she washed from Hammersmith to the owner at London, and the carrier was paid by the laundress, it was held that the latter was entitled to maintain an action against the carrier for the loss of the goods by the way, although they belonged to the consignee (*b*). In these cases the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction" (*c*).

Every person who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party. A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract (*d*).

Where a railway company was bound by statute to carry the mails, and the officers of the post-office who accompanied them, it was held that the company must exercise a reasonable care in performing the duty cast upon them by the statute, and were bound to carry safely; so that if any officer was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General (*e*).

(*z*) *Duff* v. *Budd*, 6 Moore, 469. *Stephenson* v. *Hart*, 1 M. & P. 357; 4 Bing. 476.

(*a*) *Davis* v. *James*, 5 Burr. 2680. *Bell* v. *Chaplain*, Hard, 321. *Moore* v. *Wilson*, 1 T. R. 659. *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600.

(*b*) *Freeman* v. *Birch*, 1 N. & M. 420.

(*c*) *Nicolls* v. *Bastard*, 2 C. M. & R. 660.

(*d*) *Marshall* v. *York, Newc. Berw.*, 11 C. B. 655.

(*e*) *Collett* v. *Lond. & North-West.*, 16 Q. B. 989.

Parties to be made defendants.— When goods have been delivered to the driver of a stage-coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach-proprietor, and not the mere servant or agent (*f*). But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. The 8th section of the Carriers' Act (ante, p. 400) provides that the act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its officers and servants, of the property which has come into the hands of such servants and agents in the course of their employment in the business of the company. There must be some one authorised on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company.

Where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control and charge of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff, it was held that the railway company was responsible for the unlawful detention of the property by their servant (*g*).

The common carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents, in and about the carrying of the goods by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants or agents. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages" (*h*).

When goods have been delivered to a railway company, to be carried to

(*f*) *Williams* v. *Cranston*, 2 Stark. 82.
(*g*) *Taff Vale Rail. Co.* v. *Giles*, 23 Law J., Q. B. 43.
(*h*) Page, J., Cas. temp. Hard. 90; 5 T. R. 397.

a particular destination beyond the limits of their own line of railway, and the goods are lost by the negligence of the servants employed upon an intermediate line, the railway company to whom the goods were first delivered, and with whom the contract for their conveyance was made, is the proper party to be sued for the loss, and not the company on whose line the loss actually took place (*i*). But every railway company which allows its railway to remain open for public traffic, and takes toll for the use of it by other lines, is responsible to persons who sustain injury from the line being unsafe and dangerous, although such persons are conveyed along it in the carriages of some other company (ante, p. 152) (*k*).

Declarations against a common carrier for refusing to carry should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiff tendered to the defendant certain goods to be carried from the one place to the other; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, and the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages (*l*).

Declarations for the loss of goods need not set out the general custom of the realm, making the common carrier an insurer of the safe conveyance of the articles delivered to him to be carried. It is sufficient to allege that the defendant was a common carrier of goods for hire between two named places, or in any particular locality; and that the plaintiff delivered to the defendant, and the defendant received from the plaintiff, certain goods (describing them), to be carried for hire by the defendant as such common carrier, and to be delivered at a certain specified place for the plaintiff, and that the defendant did not safely and securely carry the goods, but so negligently conducted himself in that behalf, that through the neglect and default of the defendant in the premises, the goods became wholly lost to the plaintiff.

Declarations against an innkeeper for refusing to receive the plaintiff as a guest should allege that the defendant kept a common inn for the accommodation of travellers, and that the plaintiff then being a traveller, came to the said common inn of the defendant and required the defendant to receive the plaintiff therein as a guest, and provide him with food and lodging; that the defendant then had sufficient room and accommodation in the said common inn to enable him to receive the plaintiff therein, and

(*i*) *Mytton* v. *Mid. Rail. Co.*, 4 H. & N. 621; 28 Law J., Exch. 385.
(*k*) *Birkett* v. *Whitehaven, &c. Rail. Co.*, 4 H. & N. 738.
(*l*) *Pickford* v. *Grand Junc. Rail. Co.*, 8 M. & W. 372.

the plaintiff was then ready and willing to pay the defendant his customary hire and reward for the food and accommodation he required, yet the defendant would not receive the plaintiff into the said common inn, nor provide him with suitable food and lodging, whereby the plaintiff was obliged to depart, and to travel many miles in order to procure food and lodging elsewhere, and by reason thereof was prevented from attending, &c. (setting forth any special damage that may have been sustained), and was put to great inconvenience and expense in travelling, and was and is otherwise greatly injured.

Declarations against an innkeeper for the loss of chattels deposited within the precincts of the inn need not set out the general custom of the realm making the innkeeper responsible for the safety of the goods of his guests, as the general custom is part of the common law (*m*), and need not be proved at the trial; but the declaration should allege that the defendant kept a common inn for the reception, lodging, and entertainment of travellers, that the plaintiff being a traveller came to the said common inn of the defendant, and was received and lodged therein, and that the plaintiff brought into the said common inn certain articles (describing them), and that the defendant, whilst the plaintiff abided in the said common inn as a guest, and the said articles remained within the inn, did not keep the said articles, &c. safely, but so negligently conducted himself in the matter, that they were through the negligence of the defendant taken and carried away, and have become wholly lost to the plaintiff; concluding with a claim of a certain sum for damages (*n*).

Plea of not guilty.—The plea of not guilty in actions for negligence operates, as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea. Thus, in actions against a carrier for loss of, or damage to, goods, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received, or of the plaintiff's property in the goods (*o*).

Special pleas.—If, therefore, the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special plea or traverse, allege that he did not receive the goods to be carried as in the declaration mentioned. If the plaintiff has declared against him upon his extended liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this plea or traverse (*p*). If he

(*m*) 1 Wils. 281.
(*n*) *Jones* v. *Tyler*, 1 Ad. & E. 522.
(*o*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi. lxxxii.
(*p*) *White* v. *Gt. Western Rail. Co.*, 2 C. B., N. S. 7.

denies the plaintiff's title or right to the possession of the property, he must plead a plea alleging that the property was not, at the time he received it to be carried, the property of the plaintiff (*q*); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since the bailment, become entitled to the property, and had demanded it of the defendant (*r*).

If the defendant relies upon the Common Carriers' Act, he must by his plea show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to the defendant to be carried, the value and nature of the goods were not declared by the plaintiff (*s*).

Replication.—A replication, that the loss of which the plaintiff complains arose from the felonious acts of the carrier's servants, takes the case, as we have seen (ante, p. 400), out of the operation of the Carriers' Act (*t*).

Evidence at the trial—Proof on the part of the plaintiff.—Railway companies are, as we have seen, bound by the statements and representations put forth by them in their published time-tables (ante, p. 391). In order to show that the time-table was issued by the authority of the company, it must be proved either that it was bought at one of the company's stations, or at one of their recognised receiving-offices, or that it was posted up in some office or place where the advertisements of the company were usually posted.

In order to establish a cause of action against a common carrier for refusing to receive passengers or goods, proof must be given of the exercise by him of the trade or calling of a common carrier of goods and passengers (ante, p. 390), that he had advertised, or by his course of dealing had holden out his vehicle as about to start for a particular destination, that the plaintiff tendered himself or his goods for conveyance, and was ready and willing to pay the customary fare or hire, that there was room in the common carrier's carriage, and that he refused to receive the plaintiff or his goods.

Proof of the bailment.—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorised by him to receive

(*q*) Ante, p. 309. *Cheesman* v. *Exall*, 6 Exch. 341.

(*r*) *Sheridan* v. *New Quay Co.*, 4 C. B., N. S. 618. *Europ. & Austral. R. M. Co.*, v. *R. M. St. P. Co.*, 30 Law J., C. P. 247.

(*s*) *Bianciani* v. *Lond. & S. W. Rail. Co.*, 18 C. B. 229. *Hart* v. *Baxendale*, 6 Exch. 789; 21 Law J., Exch. 123.

(*t*) *Metcalfe* v. *Lond. & Br. Rail. Co.*, 27 Law J., C. P. 205.

them. If they were merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has of course been no bailment or delivery of the goods to him (*u*), and he cannot consequently be made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, the carrier will not be responsible for the loss of the goods (*x*). If the consignor has made a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss (*y*).

If the plaintiff has merely hired the cart or carriage of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual delivery or bailment of the goods to the carrier, the latter is not responsible for their safety (*z*). If a passenger travelling on the outside of a stage-coach has kept a parcel or package in his own hands, and under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never delivered to him or to his servants, or in any way intrusted to his or their keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery and acceptance of the goods, so as to charge the carrier for the loss of them. If luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance and delivery to the passenger at the place of destination (*a*). A delivery of goods to a person sent or appointed by the carrier to receive them is, of course, a delivery to the carrier himself (*b*).

Proof of a special contract.—We have seen that every special contract,

(*u*) *Selway* v. *Holloway*, 1 Raym. 46. *Buckman* v. *Levi*, 3 Campb. 414. *Lovett* v. *Hobbs*, 2 Show. 128.

(*x*) *Edwards* v. *Sherratt*, 1 East, 619. *Slim* v *Gt. North. Rail. Co.*, 23 Law J., C. P. 166.

(*y*) *Butler* v. *Basing*, 2 C. & P. 613. *Bignold* v. *Waterhouse*, 1 M. & S. 259. *Middleton* v. *Fowler*, 1 Salk. 282.

(*z*) *East I. Co.* v. *Pullen*, 2 Str. 690.

(*a*) *Richards* v. *Lond. Bright. &c. Rail. Co.*, 7 C. B. 848; 18 Law J., C. P. 251; ante, p. 408.

(*b*) *Syms* v. *Chaplin*, 5 Ad. & E. 634; 1 N. & P. 129.

notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (ante, pp. 402, 403); and the signature must be fairly obtained, for where a party who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence, and the party signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding (*c*).

If the plaintiff has declared against the defendants as common carriers, alleging that they received the goods to be carried by them as common carriers, and it turns out that they were received under a special contract (ante, p. 401), the evidence will fail to support the declaration, unless it be shown that the special contract was unreasonable and void (*d*).

Proof of felony by a carrier's servants.—When, in consequence of the plaintiff's not having paid the extra price for lost articles of value, he is not entitled to recover, unless he shows that the things had been stolen by the carrier's servants, it is not enough for him to make out a probable case against some one or more of the carrier's servants. He must show that the things were lost under circumstances wholly inconsistent with their having been stolen by a stranger (*e*).

Proof of jus tertii by a common carrier.—A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can make no inquiries into the ownership of them. "The law protects them against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect him against the pseudo owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding" (*f*).

Proof of non-delivery of goods by common carriers may be given either by the plaintiff himself or his servants, showing that the plaintiff is the person to whom the goods were addressed, and that he has never received them (*g*); and it is for the carrier to excuse himself, if he can, for the non-delivery (ante, pp. 405–410).

Damages recoverable.—In all actions against common carriers for unlawfully refusing to receive and carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the

(*c*) *Simons* v. *Gt. West. Rail. Co.*, 2 C. B., N. S. 620.

(*d*) *White* v. *Gt. West. Rail. Co.*, 2 C. B., N. S. 17. *Latham* v. *Rutley*, 2 B. & C. 20.

(*e*) *Metcalfe* v. *Lond. & Br. &c. Rail. Co.*, 27 Law J., C. P. 333.

(*f*) *Sheridan* v. *New Quay Co.*, 4 C. B., N. S. 618; 28 Law J., C. P. 58. *Cheesman* v. *Exall*, 6 Exch. 341.

(*g*) As to the delivery of the goods, see ante, p. 405.

plaintiff, in consequence of the wrongful refusal (*h*) of the common carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses are recoverable, if claimed by the plaintiff, and specified in his declaration as part of the damage he has sustained.

If a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller and wayfarer to have shelter and accommodation in the common inn; and if he has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to go for and recover such special damage.

All persons are responsible for all the natural and legal consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and assess the damages according to the way in which the parties have conducted themselves (*i*).

Loss of, or injury to, chattels from negligence.—The amount of damages recoverable from common carriers for loss of, or injury to goods, is regulated and controlled by the several acts of parliament, requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (ante, p. 397). No greater damages than 50*l.* are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its officers; 15*l.* per head for neat cattle; and 2*l.* per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value (*k*).

Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a railway company to be carried, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value (*l*).

If special circumstances exist which render the loss of the goods, or delay in the delivery of them, productive of more than ordinary injury and damage to the owner, those special circumstances ought to be communicated to the carrier at the time the goods are delivered to him, in order to make him responsible for the special and extraordinary damages in cases of non-delivery (*m*).

(*h*) Ante, pp. 12, 13; post, ch. 22.

(*i*) *Davis* v. *North-West. Rail. Co.*, 4 Jur. N. S. 1303; post, ch. 22.

(*k*) 17 & 18 Vict. c. 31, s. 7.

(*l*) *M'Cance* v. *Lond. & North-West. Rail. Co.*, 7 H. & N. 477; 31 Law J. Exch. 65.

(*m*) *Hadley* v. *Baxendale*, 9 Exch. 354; 23 Law J., Exch. 179. *Black* v. *Baxendale*, 1 ib. 410. *Gee* v. *Lanc. & York. R. Co.*, 6 H. & N. 217.

When the consignor has been guilty of no intentional deception to conceal the risk (ante, p. 16), and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not from the apparent nature and general character and appearance of the thing be fairly presumed to exist. Thus, where the plaintiff had put a 50*l.* bank-note into his carpet-bag amongst his linen and wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on the arrival of the coach at its place of destination the bag was missed and never afterwards seen, the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the court afterwards refused to increase the verdict by the amount of the note (*n*). In other cases, however, the plaintiff has recovered the full value of the article lost (*o*).

It has been justly remarked by American jurists, that it is a principle of law that no person shall, by practising concealment or fraud, impose upon another a duty which the latter would not, if acting advisedly with full knowledge of the circumstances, have undertaken; and therefore, where one traveller put 11,250 dollars in his trunk, and another a large quantity of valuable merchandise, without giving any intimation to the coach-proprietor of the exceeding value of the contents of the trunks, and the trunks were lost, it was held that the value of the dollars and of the costly merchandise could not be recovered from the common carrier, as the latter was doubly wronged, first in being deprived of his just reward for carrying such property, and secondly in not having his attention drawn to the necessity of increased care and attention for its preservation (*p*).

Damages in respect of delay in delivery.—If by reason of goods not having been delivered in due time, the season for finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit which would have been made upon the sale of them if they had been delivered at the proper time (*q*).

(*n*) *Miles* v. *Cattle*, 4 M. & P. 630; 6 Bing. 743.

(*o*) *Sleat* v. *Fagg*, 5 B. & Ald. 342. *Walker* v. *Jackson*, 10 M. & W. 161; 2 M. & P. 342.

(*p*) Angell on Carriers, § 262.

(*q*) *Wilson* v. *Lanc. & York. Rail. Co.*, 9 C. B., N. S. 642. *Simmons* v. *S. E. R. Co.*, 7 Jur. N. S. 849. And see further, as to damages in actions against carriers, Addison on Contracts, 1066.

Injunction against railway companies to enforce compliance with the Railway and Canal Traffic Act.—By 17 & 18 Vict. c. 31, s. 3, it is enacted, that it shall be lawful for any company or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act (ante, pp. 391, 392), to apply in a summary way to the Court of Common Pleas, or any judge thereof, and that it shall be lawful for the court or judge to hear and determine the matter of the complaint, and to make inquiry, in the mode therein directed, and to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of the act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict, to order that a writ of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and to make an order directing the payment by any one or more of such companies of a sum of money not exceeding for each company the sum of 200*l.* for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict, such monies to be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment, or order, in the nature of a writ of execution; and in any such proceeding, the court or judge may order and determine that all or any costs thereof or thereon incurred shall be paid by or to the one party or the other, as the court or judge shall think fit (*r*).

"It is abundantly clear," observes Cockburn, C. J., "from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to the Court of Common Pleas against the affording of undue preference, or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public, and they cannot promote their own interests as carriers at the expense of the right of the public to that

(*r*) Forms of proceeding, &c. Reg. Gen. 18 Vict., 15 C. B. 473; C. P. Hil. Term.

equality (*s*), or give to one individual greater advantages at their stations (*t*), or upon their line, than they allow to another (*u*).

Where a railway company, in order to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own waggons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation. The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of (*x*).

In execution of the powers conferred on them by this statute, the courts will issue writs of injunction, enjoining railway companies proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, to desist from giving such undue preference (*y*). But the operation of the statute is confined to undue preferences given to one person or class of persons over another in the traffic along the same railway or canal (*z*), and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway (*a*). And it has been held that the statute (17 & 18 Vict. c. 31), is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities, and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of the carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee (*b*).

Before the court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, the court must in general be satisfied that some substantial injury or inconvenience is sustained by the public by the act complained of, and that the complaint is *bonâ fide* made on behalf of the public (*c*).

(*s*) *Baxendale* v. *Gt. West. Rail. Co.*, 5 C. B., N. S. 354; 28 Law J., C. P. 69.

(*t*) *Marriott* v. *Lond. & S. W. Rail. Co.*, 1 C. B., N. S. 499; 26 Law J., C. P. 154. *Beadell* v. *East. Co. Rail. Co.*, ib. 250. *Baxendale, in re*, 11 C. B., N. S. 787; 12 ib. 758.

(*u*) *Baxendale* v. *North Devon Rail. Co.*, 3 C. B., N. S. 324.

(*x*) Cockburn, C. J., *Garton* v. *Gt. Western Rail. Co.*, 5 C. B., N. S. 678.

(*y*) *Harris* v. *Cockermouth, &c. Rail. Co.*, 3 C. B., N. S. 693; 27 Law J., C. P. 162. *Ransome* v. *East. Co. Rail. Co.*, ib. 166; 8 C. B., N. S. 709. *Cooper* v. *Lond. & S. W. Rail. Co.*, 27 Law J., C. P. 324.

(*z*) *Bennett* v. *Manch. Sheff. & Linc. Rail. Co.*, 6 C. B., N. S. 715.

(*a*) *Jones* v. *East. Co. Rail. Co.*, 3 C. B., N. S. 718.

(*b*) *Nicholson* v. *Gt. West. Rail. Co.*, 5 C. B., N. S. 441.

(*c*) *Painter* v. *Lond. & Br. R. Co.*, 2 C. B., N. S. 702. *Re Caterham Rail. Co.*, 1 C. B., N. S. 410.

CHAPTER XI.

OF WRONGFUL DISTRESS—DISTRESS FOR RENT—DISTRESS DAMAGE FEASANT.

SECTION I.—*Of unlawful and excessive distresses.*—Distress for rent in arrear—Of conditions precedent to the right to distrain—Distress for rent payable in advance—Distress after the termination of the term of hiring—Distress by agents, joint-tenants, tenants-in-common, &c.—Agreements not to distrain—Acceptance of bill or note by way of payment—Tender before distress—Time, mode, and place of distraining—Things distrainable and not distrainable—Distress of growing crops—Mortgaged chattels and things in the custody of the law—Things distrainable under a license to distrain—Things fraudulently removed—What amounts to a distress—Abuse of the right to distrain rendering parties trespassers *ab initio*—Distress when no rent was in arrear—Excessive distresses—Distress for more rent than was due—Repeated distresses—Impounding—Pound-breach—Abandonment of distress—Statutory power of sale—Tender of rent before sale—Notice of distress—Appraisement and sale—Costs and expenses—Non-compliance with the statutes authorising the sale—Keeping of the distress without selling—Indemnification of bailiffs.

SECTION II.—*Of distress damage feasant.*—Seizure and impounding of animals damage feasant—Trespass on unfenced land—What things may be distrained damage feasant—Distress by railway companies of locomotive engines damage feasant—Tender of amends—Sale of impounded animals—Liabilities of pound-keepers.

SECTION III.—*Remedies for unlawful and excessive distresses.*—Replevin of things distrained—Actions—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF UNLAWFUL AND EXCESSIVE DISTRESS.

Distress for rent in arrear.—By the common law, landlords to whom rent is due, and who are clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises, and seizing the moveables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained. This remedy by distress is said to have come to us from the civil law, where the land farmed out to the tenant was hypothecated, or pledged in his hands to

answer the rent agreed to be paid; the whole profits arising from the soil being liable to the lord's seizure (*d*).

It is essential to the lawful exercise of the power of distress, that there be a tenancy for a term, or at will, at an ascertained rent (*e*), and that the distrainor be the party entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy (*f*). "If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party (*g*), or being himself only a lessee, he has assigned his lease, or if, after granting an under-lease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has no right or power to distrain (*h*). It has been holden that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such under-lease" (*i*).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrong-doer, the lessor has no power at common law to distrain the goods and chattels of the tenant for rent in respect of such occupation (*k*). Neither can he distrain except under the statute of Anne (post, p. 437), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent (*l*).

If the tenant becomes bankrupt or insolvent, and the assignees decline to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy and certificate, or discharge, of his right to distrain (*m*). If a lessee, having granted an under-lease, becomes bankrupt, such bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the bankrupt from the rent payable to the superior

(*d*) Gilbert on Rents, 5; on Distresses, 2.

(*e*) *Anderson* v. *Mid. Rail. Co.*, 30 Law J., Q. B. 94. *Howe* v. *Scarrott*, 28 Law J., Exch. 325. *Jolly* v. *Arbuthnot*, 28 Law J., Ch. 547. Addison on Contracts, p. 323, 5th ed.

(*f*) 8 & 9 Vict. c. 106, s. 9.

(*g*) *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656. *Preece* v. *Corrie*, 2 M. & P. 64; 5 Bing. 24; 5 M. & R. 157, 162. *Smith* v. *Mapleback*, 1 T. R. 441.

(*h*) *Burne* v. *Richardson*, 4 Taunt. 720. *Hopcroft* v. *Keys*, 2 M. & Sc. 760; 9 Bing. 613. *Langford* v. *Selmes*, 3 K. & J. 220.

(*i*) *Curtis* v. *Wheeler*, 1 M. & M. 493.

(*k*) *Jenner* v. *Clegg*, 1 M. & Rob. 213. *Alford* v. *Vickery*, 1 Car. & Marsh. 283, *Phené* v. *Popplewell*, 12 C. B., N. S. 334; 31 Law J., C. P. 235.

(*l*) *Zouch* v. *Willingale*, 1 H. Bl. 311. *Beavan* v. *Delahay*, 1 H. & Bl. 8.

(*m*) *Triggs* v. *Sowry*, 8 M. & W. 729. *Newton* v. *Scott*, 9 M. & W. 434; 10 M. & W. 471. *Phillips* v. *Shervill*, 6 Q. B. 944; 14 Law J., Q. B. 144. But the distress is not available for more than one year's rent accrued prior to the filing of the petition in insolvency, 12 & 13 Vict. c. 106, s. 129.

landlord (*n*). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown (*o*). A landlord, moreover, cannot distrain twice for the same rent, unless the distress has been withdrawn at the instance or request of the tenant, or unless there has been some mistake as to the value of the things taken. It is vexatious in a landlord to make repeated distresses unnecessarily (*p*).

When there is no certain ascertained rent there is no right to distrain.—If lands and houses have been demised together at one entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good (*q*). Where there was a lease of one hundred acres of land at an annual rent of 79*l.*, and eight of these acres were in the possession of another tenant under a prior demise, it was held that the lessor could not distrain for any part of the rent, as it was reserved in respect of the whole one hundred acres, and the rent was entire and unapportionable (*r*). But where a new agreement is come to providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress (*s*).

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.* per thousand for all the bricks that he made from the brick-mine, by quarterly payments at the usual quarter-days, and the brickmaker took possession of the pit and mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain (*t*). And where land was holden upon the terms that the plaintiff should not sell hay off the demised premises under a penalty of 2*s.* 6*d.* a yard, to be recovered by distress as for rent in arrear, it was held that the penalty might be treated as a rent payable in respect of every sale made in breach of the agreement, that the amount due was capable of being ascertained with certainty, and might be recovered by distress (*u*).

If a tenant has entered into possession under an agreement which does

(*n*) *Peskett* v. *Somers*, coram Wilde, C. J., Sittings after Hil. Term, 1850.
(*o*) *Rex* v. *Cotton*, Parker, 112.
(*p*) *Bagge* v. *Mawby*, 8 Exch. 649. *Dawson* v. *Cropp*, 1 C. B. 961.
(*q*) *Gardiner* v. *Williamson*, 2 B. & Ad. 339.
(*r*) *Neale* v. *Mackenzie*, 1 M. & W. 763.
(*s*) *Watson* v. *Waud*, 8 Exch. 335.
(*t*) *Daniel* v. *Gracie*, 6 Q. B. 145.
(*u*) *Pollitt* v. *Forest*, 11 Q. B. 949; 16 Law J., Q. B. 424.

not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain (*x*). But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only (*y*), or whenever by payment of rent, or otherwise, any tenancy at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due (*z*). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain" (*a*).

Of conditions precedent to the right to distrain.—The right to distrain may be made conditional, or may be postponed by the contract of the parties (*b*). Where a lessee agreed to take, and the lessor to let, a house and premises at a yearly rent, payable quarterly, and the lessor agreed to complete the house, and fix a bresummer in the back front window, and allow the lessee 15*l.* towards erecting an oven, and the lessee took possession and built the oven, but the lessor never completed the house nor fixed the bresummer, and the lessee refused payment of the rent, whereupon the lessor distrained, it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished (*c*). And where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent, payable quarterly, the house to be furnished completely, in a manner suitable to a ladies' school, and the lessee took possession, it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to his right to distrain for the rent (*d*). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessee will have his power of distress.

Distress for rent payable in advance—Rent when due—Several demises.—Rent may be made payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter (*e*). When there is a reservation of an annual rent, or a covenant, or agreement by a tenant to pay so much a-year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that,

(*x*) *Hegan* v. *Johnson*, 2 Taunt. 148.
(*y*) *Anderson* v. *Mid. Rail. Co.*, 30 Law J., Q. B. 96.
(*z*) *M'Leish* v. *Tate*, Cowp. 783.
(*a*) *Knight* v. *Bennett*, 11 Moore, 222; 3 Bing. 361. *Cox* v. *Bent*, 2 M. & P. 281; 5 Bing. 185.
(*b*) *Giles* v. *Spencer*, 3 C. B., N. S. 253; 26 Law J., C. P. 237.
(*c*) *Regnart* v. *Porter*, 5 M. & P. 370.
(*d*) *Mechelen* v. *Wallace*, 7 Ad. & E. 54, n.
(*e*) *Lee* v. *Smith*, 9 Exch. 665.

the rent was to be paid quarterly (*f*). Where a landlord agreed to let a house at a yearly rent of 50*l.*, and likewise the stable and loft at a further rental of 25*l.* per annum, to be paid on the usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50*l.* rent was payable yearly, and the 25*l.* rent payable quarterly (*g*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly (*h*).

If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*i*).

Distress after the termination of the term of hiring.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the determination thereof, as his reversion was then gone, the entire estate being revested in him in possession (*k*), but now, by 8 Anne, c. 14, ss. 6, 7, it is enacted, that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease, in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due. *Primâ facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon. But the Court of Queen's Bench has holden a distress to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant (*l*). Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain (*m*). Where a tenant went away,

(*f*) *Collett* v. *Curling*, 10 Q. B. 785; 16 Law J., Q. B. 390.
(*g*) *Coomber* v. *Howard*, 1 C. B. 440.
(*h*) *Mallam* v. *Arden*, 3 M. & Sc. 795; 10 Bing. 299.
(*i*) 1 Inst. 47 b, 161 a; Gilb. 61.
(*k*) *Williams* v. *Stiven*, 9 Q. B. 14; 15 Law J., Q. B. 321.
(*l*) *Braithwaite* v. *Cookesey*, 1 H. Bl. 465.
(*m*) *Turner* v. *Barnes*, 31 Law J., Q. B. 170.

leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises (*n*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop. All the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain. Therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the out-going tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord (*o*).

If, by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it the tenant holds over, with the consent of the landlord, he must hold upon the terms and liable to all the conditions and covenants of the lease (*p*). If after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy (*q*).

Distress by agents — Joint-tenants — Tenants-in-common, &c. — A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorised to collect and receive the rents for his own benefit (*r*). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor. A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The cestui que trust, therefore, may distrain in the name of the trustee, and a mortgagor, in certain cases, in the name of the mortgagee (*s*). A receiver appointed

(*n*) *Taylerson* v. *Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*o*) *Beavan* v. *Delahay*, 1 H. Bl. 9. *Lewis* v. *Harris*, ib. 7, n. (*a*). *Nuttall* v. *Staunton*, 4 B. & C. 51.

(*p*) *Beavan* v. *Delahay*, 1 H. Bl. 9; ante, p. 434.

(*q*) *Zouch* v. *Willingale*, 1 H. Bl. 311.

(*r*) *Ward* v. *Shew*, 2 M. & Sc. 756; 9 Bing. 608.

(*s*) *Trent* v. *Hunt*, 9 Exch. 14; 22 Law J., Exch. 320. *Snell* v. *Finch*, 32 Law J., C. P. 117; 13 C. B., N. S. 651.

by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that purpose (*t*). One joint-owner or joint-reversioner may distrain alone, but he must avow and justify the taking of the distress in his own right, and as bailiff to the other (*u*). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent (*x*). The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conusance as the bailiff of the others without averring or showing any express authority from them to distrain (*y*). If one of several joint-tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion (*z*).

Tenants-in-common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorise a bailiff to distrain on behalf of all, or one tenant-in-common may distrain on his own account, and as the bailiff and agent of the others, but they must avow and justify the taking of the distress separately in respect of their several shares (*a*). And one tenant-in-common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each; and therefore, where a lessee holding under two tenants-in-common, at a yearly rent of 18*l.*, payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant-in-common, it was held that the party who had thus given the notice might distrain upon the land for his moiety of the rent (*b*). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l.* per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants-in-common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest (*c*).

Distress by executors and administrators.—By 3 & 4 Wm. 4, c. 42, ss. 37, 38, the executors and administrators of a lessor or landlord may

(*t*) *Brandon* v. *Brandon*, 5 Mad. 473. *Bennett* v. *Robins*, 5 C. & P. 379.

(*u*) *Pullen* v. *Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

(*x*) *Robinson* v. *Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234.

(*y*) *Leigh* v. *Shepherd*, 5 Moore, 297; 2 B. & B. 465.

(*z*) *Staveley* v. *Allcock*, 16 Q. B. 636; 20 Law J., Q. B. 321.

(*a*) Litt. sec. 314–317.

(*b*) *Harrison* v. *Barnby*, 5 T. R. 246.

(*c*) *Whitley* v. *Roberts*, M. Cl. & Y. 107.

distrain upon lands demised for any term or at will for arrearages of rent due to such lessor or landlord in his lifetime.

Agreements not to distrain.—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service (*d*). If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him (*e*).

Acceptance of a bill or note by way of payment.—A landlord is not deprived of his right to distrain by the acceptance of a bill, or note, or security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain (*f*), or unless it be proved that the note was paid at maturity (*g*). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonoured, the landlord may return the money to the bailiff or treat it as an advance or loan from him, and distrain again for the unpaid rent (*h*).

Tender of rent before distress renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of distress, but, before it is executed, the rent is tendered, the right to distrain is gone (*i*).

Time, mode, and place of distraining.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent (*k*). A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building in order to make a distress (*l*), but he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house (*m*). A distress, moreover, cannot be made after sunset, or before sunrise (*n*); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If,

(*d*) *Giles* v. *Spencer*, 3 C. B., N. S. 244; 26 Law J., C. P. 237.

(*e*) *Horsford* v. *Webster*, 1 C. M. & R. 699. *Welsh* v. *Rose*, 6 Bing. 638; 4 M. & P. 490.

(*f*) *Davis* v. *Gyde*, 2 Ad. & E. 626.

(*g*) *Harris* v. *Shipway*, Bull, N. P. 182a.

(*h*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 Law J., Exch. 291.

(*i*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 Law J., Exch. 224.

(*k*) 21 Hen. 6, 40. *Duppa* v. *Mayo*, 1 Saund. 287.

(*l*) *Brown* v. *Glenn*, 16 Q. B. 254; 20 Law J., Q. B. 205; 15 Jur. 280.

(*m*) *Ryan* v. *Shilcock*, 7 Exch. 72; 21 Law J., Exch. 55; 15 Jur. 1200.

(*n*) Co. Litt. 142a; Gilb. 50. *Tutton* v. *Darke*, 5 H. & N. 654; 29 Law J., Exch. 271.

therefore, a tenant enjoys an easement over, or a right to use, the land of a third party, and has, in the *bonâ-fide* exercise of such right, placed his goods and chattels on the land of such third party, the lessor has no right to distrain them there. Thus, where a wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low-water mark, as a place of deposit for boats and barges resorting to the wharf, it was held that the lessor of the wharf had no right to distrain the barges of the tenant lying on such land and bed of the river alongside the wharf, although they were attached to the wharf by head and stern-ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the tenant (*o*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ-fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant.

Things not distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, cauldrons, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury (*p*). But if they are attached to the freehold by bolts and screws, so as to be moveable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removeable, are distrainable (*q*). A millstone in a mill, and an anvil in the smith's shop, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though it is not when taken actually affixed to the freehold (*r*).

By 51 Hen. 3, stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; and to render other animals exempt on the ground that they profit the land, within 51 Hen. 3, st. 4, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been

(*o*) *Buszard* v. *Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150.

(*p*) Co. Litt. 47 b. *Pitt* v. *Shew*, 4 B. & Ald. 207. *Darby* v. *Harris*, 1 Q. B. 898. *Dalton* v. *Whitten*, 3 Q. B. 961.

(*q*) *Hellawell* v. *Eastwood*, 6 Exch. 309; 20 Law J., Exch. 155.

(*r*) Bro. Abr. DISTRESS, pl. 23.

broken to harness, and are regularly employed in ploughing, harrowing, or drawing carts or waggons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that profit the land" within the meaning of the statute (*s*). Sheep, also, are exempt from distress at common law, independently of the stat. 51 Hen. 3, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent (*t*).

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the labourer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them (*u*). Wearing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house (*x*). The horse and goods of a guest at a common inn cannot be distrained for the rent of the inn, or its precincts, and this is a privilege allowed to inns for the security and protection of travellers.

Perishable articles, money, growing crops, fruit, &c., have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to a rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered (*y*), and other things of a perishable nature, could not be distrained; but as the statute 2 W. & M. c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart. Growing corn, grass, fruits, hops,

(*s*) *Keen* v. *Priest*, 32 Law T. R., Exch. 131.

(*t*) *Keen* v. *Priest*, 4 H. & N. 236; 28 Law J., Exch. 157.

(*u*) *Simpson* v. *Hartopp*, Willes, 512. *Wood* v. *Clarke*, 1 Cr. & J. 484. *Harvey* v. *Pocock*, 11 M. & W. 740; Co. Litt. 47a. *Nargatt* v. *Nias*, 28 Law J., Q. B. 143.

(*x*) Bac. Abr. INNS, B.

(*y*) *Morley* v. *Pincombe*, 2 Exch. 101.

roots, and growing produce, also, were not distrainable, as the crop was attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed (*z*). But the acts of 2 W. & M. c. 2, s. 3, and 11 Geo. 2, c. 19, ss. 8 and 9, now enable the lessor to distrain loose corn and corn in the sheaf; straw and hay, growing corn, grass, hops, roots, fruits, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs, and plants growing in nursery-gardens, nor to money (*a*).

Property of strangers on the demised premises in their own possession.—The landlord has no right to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling-house, or under a shed upon the demised premises; or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable-door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill-door whilst the corn was being ground to be taken back, nor a horse which has brought yarn to a private beam belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished; the horse in each of these cases being in the possession and use, and under the control, of the owner or his servant (*b*). Neither can the landlord distrain the boat or barge of a third party lying in a private dock or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and is in his use and possession, and not in the use and possession nor under the control of the tenant; but if it is abandoned and left upon the premises, in the possession or use, or under the care, of the tenant or his servants, then it is distrainable (*c*).

The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third parties placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c. in the hostelry, nor the

(*z*) 1 Rolle Abr. 667; Bradb. 213; Gilb. 32.

(*a*) *Clark* v. *Gaskarth*, 2 Moore, 491.

(*b*) *Read* v. *Burley*, Cro. Eliz. 596.

(*c*) *Muspratt* v. *Gregory*, 3 M. & W. 677.

materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn, nor meal in a mill, nor in a market, for it is in custody (protection) of law (*d*).

Property of strangers placed on the demised premises, with the leave and license of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them (*e*).

Materials placed on the demised premises to be manufactured or worked upon.—The goods and chattels of third parties placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking-manufacturer, placed in the house of the tenant, a stocking-weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn (*f*); also the silk of a velvet-manufacturer, delivered to a tenant, a silk-weaver, and taken home by him to be made into velvet at his own house (*g*); bullocks sent to a slaughterer, or carcase-butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed (*h*); corn sent to a miller to be ground; old clothes sent to a tailor's; casks sent to a cooper's, or boats to a boat-builder, to be repaired; goods sent to a weigher to be weighed, or to an auctioneer, commission-agent, factor, warehouseman, granary-keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade (*i*). "The principle of the exemption," observes Parke, B., "is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately; or buy or sell in markets or fairs, and thus supply themselves with the commodities of life" (*k*).

Property of guests at an inn cannot be distrained for rent, for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn (*l*).

Chattels in the custody of the law not distrainable.—Goods and chattels which have been actually seized upon a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be

(*d*) 7 Hen. 7, 1 b; Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47a. *Gisbourn* v. *Hurst*, 1 Salk. 249.

(*e*) *Joyce* v. *Fowkes*, 2 Vern. 120. *Horsford* v. *Webster*, 1 C. M. & R. 696. *Giles* v. *Spencer*, 3 C. B., N. S. 253.

(*f*) *Wood* v. *Clarke*, 1 Cr. & J. 484.

(*g*) *Gibson* v. *Ireson*, 3 Q. B. 39.

(*h*) *Brown* v. *Shevill*, 2 Ad. & E. 138.

(*i*) Bac. Abr. DISTRESS, B. *Williams* v. *Holmes*, 8 Exch. 861. *Adams* v. *Crane*, 1 C. & M. 380. *Brown* v. *Arundel*, 10 C. B. 54. *Gilman* v. *Elton*, 6 Moore, 249. *Thompson* v. *Mashiter*, 8 Moore, 254. *Matthias* v. *Mesnard*, 2 C. & P. 353.

(*k*) *Joule* v. *Jackson*, 7 M. & W. 451.

(*l*) Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.

distrained for rent, as they are in the custody of the law (*m*), but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent (*n*), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. s. 1), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent (*o*), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken (*p*).

The landlord is entitled, in some cases, to a year's rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises (*q*).

Statutory exemption from distress in favour of foreign ambassadors.—It has been enacted and declared by 7 Anne, c. 12, s. 3, on grounds of public policy, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

Things distrainable—Chattels of traders left on the demised premises in the possession of the tenant.—If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed, the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is nowise essential to the carrying on the trade of the publican that the brewer should find the casks (*r*). So, if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt-works without the possession of the boat being at all parted with by the owner." Upon the same principle it has been holden that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard in the possession of

(*m*) *Wharton* v. *Naylor*, 12 Q. B. 673.
(*n*) *Humfrey* v. *Gery*, 7 C. B. 507.
(*o*) *Smith* v. *Russell*, 3 Taunt. 400. *St. John's Coll.* v. *Murcott*, 7 T. R. 263.
(*p*) *Blades* v. *Arundale*, 1 M. & S. 713.
(*q*) As to this, and as to Distress by Bailiffs of the County Court, see post, ch. 14, s. 1.
(*r*) *Joule* v. *Jackson*, 7 M. & W. 451.

the brewer, or his servant, to be loaded with a return cargo of grains, or beer, is distrainable for the rent of the brewing premises (*s*).

If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercises some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission-agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption (*t*). It has been held that a carriage standing at livery is distrainable (*u*). Whenever a chattel, such as a threshing-machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if it is not in actual use at the time of the levying of the distress (*x*). There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable (*y*); but this decision appears to be directly at variance with numerous authorities, and with the principles established for the benefit of trade, and cannot now be considered law (*z*).

With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (ante, p. 443), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. This is the case with the horses and carriages of strangers standing at livery on the demised premises, and not being at the time of the distress under the charge or in the possession of the owner or his servants (*a*).

Distress of growing crops and corn.—By 2 W. & M. c. 5, s. 3, and 11 Geo. 2, c. 19, ss. 8, 9, landlords are enabled to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruits, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs, and plants growing in nursery-gardens, nor to money (*b*). And, by 14 & 15 Vict. c. 25, s. 2, it is enacted, that in case growing crops are seized and sold by the sheriff or other officer, under an execution, such

(*s*) *Muspratt* v. *Gregory*, 3 M. & W. 677.

(*t*) *Findon* v. *M'Laren*, 6 Q. B. 891.

(*u*) *Francis* v. *Wyatt*, 3 Burr. 1498; 1 W. Bl. 483. *Parsons* v. *Gingell*, 4 C. B. 545.

(*x*) *Fenton* v. *Logan*, 3 M. & Sc. 82. *Gorton* v. *Falkner*, 4 T. R. 565.

(*y*) *Fowkes* v. *Joyce*, 3 Lev. 260; 2 Ventr. 50.

(*z*) *Tute* v. *Gleed*, 2 Saund. 290a.

(*a*) *Parsons* v. *Gingell*, 4 C. B. 545; 16 Law J., C. P. 230.

(*b*) *Hellawell* v. *Eastwood*, 6 Exch. 309; 20 Law J., Exch. 155.

crops, so long as the same shall remain on the land, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may become due after any such seizure and sale, and to the remedies by distress for the recovery of such rent, notwithstanding any sale or assignment which may have been made or executed of such growing crops by any sheriff or other officer.

Distress of chattels mortgaged by the tenant. — Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee, or of his promise to return the goods to the latter, it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been before they were taken away (*c*).

If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankrupt Act was never intended to favour the mortgagee at the expense of the landlord (*d*).

Things distrainable under a license to distrain.—If a debtor gives his creditor a license to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises (*e*), and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a license of this sort cannot be made to extend to and to bind those who are not parties to it (*f*). If, therefore,

(*c*) *Evans* v. *Wright*, 2 H. & N. 527; 27 Law J., Exch. 50.

(*d*) *Brocklehurst* v. *Lane*, 7 Ell. & Bl. 185; 26 Law J., Q. B. 107.

(*e*) As to after-acquired property, see *Reeve* v. *Whitmore*, 32 Law J., Ch. 497.

(*f*) *Howes* v. *Ball*, 7 B. & C. 481.

the occupier of a farm borrows money, and binds himself to pay interest, and covenants that if the interest should be in arrear for a certain time, the covenantee shall have power to enter upon the farm and distrain for the arrears in the same manner as landlords may distrain for rent: this will be a license to the covenantee to enter and seize all the goods on the premises then belonging to the covenantor, but will not enable him to take the goods of a stranger (*g*). A license to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another (*h*).

The grantee of a rent-charge, with power of distress, may justify the taking corn, &c., in a stack or in trusses, under the statute 2 Wm. and Mary, sess. 1, c. 5 (ante, p. 446), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff whose goods have been taken held under a demise prior to the rent-charge, he ought to reply that fact (*i*).

Distress and seizure of things fraudulently removed.—By 11 Geo. 2, c. 19, s. 1, it is enacted, that if any tenant of any lands or tenements upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises, provided (s. 2) they have not, before the seizure, been sold *bonâ fide* and for a valuable consideration to a person ignorant of the fraud.

Where the goods have been placed in any building or inclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the daytime break open the building and seize the goods; but, before breaking open a dwelling-house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling-house (*k*).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute (*l*).

(*g*) *Freeman* v. *Edwards*, 2 Exch. 739.

(*h*) *Brown* v. *Metrop. &c.*, 1 Ell. & Ell. 838; 28 Law J., Q. B. 236, ante, p. 78.

(*i*) *Johnson* v. *Faulkner*, 2 Q. B. 936.

(*k*) As to pleas of justification of the seizure of goods under this statute, *Williams* v. *Roberts*, 7 Exch. 620.

(*l*) *Opperman* v. *Smith*, 4 D. & R. 33. *Johns* v. *Jenkins*, 1 Cr. & M. 227.

If, therefore, goods are removed on quarter-day, they may be followed though the rent is not in arrear, and there is no right to distrain until the day after (*m*). But if the rent is not due, or there is sufficient distress on the demised premises, independently of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods (*n*). The statute applies solely to the goods of a tenant. If, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant, the landlord cannot follow them and distrain them (*o*). To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt, or (if the goods do not exceed 50*l.* in value) by a summary proceeding before two justices (*p*).

What amounts to a distress for rent.—It is not necessary, in order to make a distress for rent, that the lessor or his agent should take corporal possession of the things intended to be distrained. It is sufficient if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains them for his rent. Thus, when a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker, who made a formal distress, but in the mean time the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed (*q*). So, where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory, and left his inventory at the dwelling-house, with a notice of distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter without leaving any one in possession of the things distrained was not an abandonment of the distress (*r*). And where the agent of the lessor went into a field forming part of the demised premises, where the tenant's cattle

(*m*) *Dibble* v. *Bowater*, 2 Ell. & Bl. 564.
(*n*) *Rand* v. *Vaughan*, 1 Sc. 670.
(*o*) *Thornton* v. *Adams*, 5 M. & S. 38.
(*p*) *Horsefall* v. *Davy*, 1 Stark. 169. *Bromley* v. *Holden*, Mood. & Malk. 175.
Bach v. *Meats*, 5 M. & S. 200.
(*q*) *Wood* v. *Nunn*, 2 M. & P. 30; 5 Bing. 10.
(*r*) *Swann* v. *Earl Falmouth*, 8 B. & C. 456; 2 M. & R. 534.

were grazing, and placing his hand upon one of the beasts, declared that he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular inclosure (*s*). But a mere notice by a landlord that he has distrained things not distrainable, unaccompanied by any seizure or removal of the goods, will not constitute any cause of action (*t*).

If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent (*u*). Where a lodging-house keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of his tenant to be removed from the apartments, saying that he should detain them until his rent was paid, and the tenant brought an action against him for a conversion of the chattels, it was held that the detainer amounted to a distress for rent, and that the action was not maintainable (*x*). And where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable (*y*).

Abuse of the right to distrain, rendering parties trespassers ab initio.— If a landlord going to distrain breaks open an outer door, or gets in through a window, and then breaks the door open and seizes the goods in the house, this is not a distress (ante, p. 221), but a trespass, and he is responsible for all the damage sustained by the tenant (*z*); and if a distress has been lawfully effected in the first instance, but the landlord or his bailee abuses the distress by using or working horses or animals distrained, he becomes a trespasser *ab initio* (*a*); but by statute 11 Geo. 2, c. 19, s. 19, it is enacted, that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*; but the party grieved may recover

(*s*) *Thomas* v. *Harries*, 1 Sc. N. R. 524.
(*t*) *Beck* v. *Denbigh*, 29 Law J., C. P. 273.
(*u*) *Green* v. *St. Cath. Dock. Co.*, 19 Law J., Q. B. 53.
(*x*) *Colton* v. *Bull*, Easter Term, 1857, C. P.
(*y*) *Hartley* v. *Moxham*, 3 Q. B. 701.
(*z*) *Attack* v. *Bramwell*, 32 Law J., Q. B. 148.
(*a*) *Oxley* v. *Watts*, 1 T. R. 12. *Six Carpenters'* case, 8 Co. 146a.

satisfaction for the damage in a special action of trespass, or on the case at the election of the plaintiff, and if he recover he shall have full costs. This statute, however, does not apply where the original entry was unlawful, and no valid distress has been effected (*b*).

If a distrainor abuses a distress by working an animal distrained, the owner may interfere to prevent it, and an action cannot be maintained against him for pound-breach or rescue (*c*).

Of unlawful distress when no rent was in arrear.—If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and, after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*d*). By the statute 2 Wm. & Mary, sess. 1, c. 5, s. 5, it is enacted, that if any person shall distrain for rent pretended to be due or in arrear when no rent was due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit (post, ch. 22).

Excessive distresses.—By the stat. of Marlbridge, c. 4, it is enacted, that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses. Lord Coke, in his reading on this statute, observes, that it is worthy of observation "how provident the makers of the statute be that men's beasts, cattell, or goods be not excessively distrained," and that "this agreeth with the reason of the common law" (*e*). It is the duty, therefore, of every person who has by law a right to distrain, to make a fair and reasonable distress; and if there be a breach of that duty, and the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realising the rent and expenses, he renders himself liable to an action for damages at the suit of the lessee. If he distrains the crops growing in two fields, when the crop growing in one would be sufficient, when at maturity, to satisfy the rent and charges, the distress is an excessive distress (*f*). But it is not for every trifling excess that an action is maintainable; it must be clearly disproportionable and excessive (*g*). And "if there is but one thing which can be taken, so that it must be taken or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken" (*h*). A distress may be excessive although the goods when sold may not realise enough to cover the rent due and the

(*b*) *Attack* v. *Bramwell*, ante, p. 450.
(*c*) *Smith* v. *Wright*, 6 H. & N. 821; 30 Law J., Exch. 313.
(*d*) Gilb. 61.
(*e*) 2 Inst. c. 4, p. 107; 52 Hen. 3, c. 4.
(*f*) 52 Hen. 3, c. 4. *Piggott* v. *Birtles*, 1 M. & W. 441.
(*g*) *Roden* v. *Eyton*, 6 C. B. 430.
(*h*) *Field* v. *Mitchell*, 6 Esp. 71.

expenses (*i*). The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*k*); and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorises him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress (*l*). The tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law (*m*).

Distress for more rent than is due.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress (*n*). A declaration, therefore, which alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterwards sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress (*o*). The distraining of chattels on a claim of more rent being in arrear than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so for an amount exceeding the real arrears of rent, he may sell afterwards only for that which is really due; secondly, because, from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done maliciously, for an act

(*i*) *Smith* v. *Ashforth*, 29 Law J., Exch. 259.

(*k*) *Fisher* v. *Algar*, 2 C. & P. 374. *Bail* v. *Mellor*, 19 Law J., Exch. 279.

(*l*) *Willoughby* v. *Marshall*, 4 D. & R. 539; 2 B. & C. 821.

(*m*) *Baylis* v. *Usher*, 4 M. & P. 790.

(*n*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 Law J., Exch. 127.

(*o*) *Tancred* v. *Leyland*, 16 Q. B. 669. *French* v. *Phillips*, 26 Law J., Exch. 82. 1 H. & N. 564.

which does not amount to a legal injury cannot be actionable because it is done with a bad intent (*p*).

Repeated distresses for the same rent.—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken (*q*); or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If, after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again (*r*). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonoured when it arrives at maturity, the landlord may, as we have seen, distrain again (*s*).

Impounding the goods—Pound-breach.—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises (*t*). No formal impounding is required, as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus, where the landlord distrained four casks of beer in a cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock or key, or leaving any person in charge of them, it was held that the casks were duly impounded (*u*). So, where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker who levied the distress, were opened, and the beasts taken out and driven away, it was held that this was a pound-breach, rendering the party who committed the act liable to treble damages under the statute (*x*). And if the distrainor enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete, at all events from the time of such notice (*y*).

Formerly the distrainor, in removing the goods distrained, might have

(*p*) *Stevenson* v. *Newnham*, 13 C. B. 297; 22 Law J., C. P. 110.

(*q*) *Bagge* v. *Mawby*, 8 Exch. 649. *Dawson* v. *Cropp*, 1 C. B. 961.

(*r*) *Lee* v. *Cooke*, 2 H. & N. 584; 3 H. & N. 203; 27 Law J., Exch. 337.

(*s*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 Law J., Exch. 291.

(*t*) 2 Wm. & M. sess. 1, c. 5; 11 Geo. 2, c. 19, s. 10.

(*u*) *Firth* v. *Purvis*, 5 T. R. 432.

(*x*) *Castleman* v. *Hicks*, Car. & Marsh. 266.

(*y*) *Thomas* v. *Harries*, 1 Sc. N. R. 534.

removed them to any place he thought fit for the purpose of impounding them, but the statute of Marlbridge (1 & 2 Ph. & M. c. 12, s. 1) prohibits the distrainor from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound-overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainor uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel (*z*), tans hides, or uses or works beasts or cattle; he of course subjects himself to an action for damages at the suit of the owner thereof (*a*). As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach, and subjecting himself to an indictment (*b*), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due (*c*). But where the distress is being used in a manner which the law will not justify, the owner may interfere to prevent the abuse (*d*). If the pound is broken, and the goods are unlawfully taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third party for the purpose of retaking the goods, except it be on fresh pursuit (*e*).

Penalties are imposed (12 & 13 Vict. c. 92, 17 & 18 Vict. c. 60) on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord or his bailiff finds them, but takes an inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the goods. Each room is for the convenience of the tenant, and with his assent, converted into a pound for the goods therein (*f*).

Abandonment of distress.— Leaving possession of goods distrained is not necessarily an abandonment of the distress. If, therefore, a bailiff or party in possession goes away for a temporary purpose, and is then locked out, he may break open the outer door of the house to recover possession of the distress (*g*).

(*z*) *Dod* v. *Monger*, 6 Mod. 216.
(*a*) *Duncomb* v. *Reeve*, Cro. Eliz. 783.
(*b*) *Rex* v. *Bradshaw*, 7 C. & P. 233.
(*c*) 2 Wm. & M. sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10; Co. Litt. 47 b. *Costworth* v. *Betison*, 1 Raym. 104.
(*d*) *Smith* v. *Wright*, 6 H. & N. 821.
(*e*) *Rich* v. *Woolley*, 5 M. & P. 675; 7 Bing. 651.
(*f*) *Tennant* v. *Field*, 8 Ell. & Bl. 336; 27 Law J., Q. B. 33.
(*g*) *Bannister* v. *Hyde*, 29 Law J., Q. B. 141; 6 Jur. N. S. 171.

Statutory power of sale.—The statute 2 Wm. & Mary, c. 5, s. 1, recites that distresses not being to be sold, but only detained as pledges for enforcing the payment of rent, the persons distraining have little benefit thereby, for remedying whereof it is enacted (s. 2), that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house, or other most notorious place on the premises: charged with the rent, replevy the same with sufficient security, &c. (post, s. 2); that then, after such distress and notice, and after the expiration of the said five days, the person distraining "shall and may," with the sheriff or under-sheriff of the county, or with the constable, &c., cause the goods and chattels to be appraised by two sworn appraisers, and after such appraisement "shall and may lawfully sell the goods so distrained for the best price that can be gotten towards satisfaction of the rent and charges."

Tender of rent rendering a sale unlawful.—If after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the statute of Wm. and Mary, which gives the tenant five days to replevy the things distrained (s. 2), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within the five days (*h*). In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the rent due, and if, after that, the landlord takes the corn, he may be proceeded against as a trespasser (*i*).

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the costs of the distress up to the time of the tender, and the bailiff refuses to give up the goods, and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages (*k*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful (*l*).

Parties to whom tender may be made.—A bailiff authorised to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this

(*h*) *Johnson* v. *Upham*, 28 Law J., Q. B. 252; 5 Jur. N. S. 681, overruling, on this point, *Ladd* v. *Thomas*, 12 Ad. & E. 117. *Ellis* v. *Taylor*, 8 M. & W. 415.

(*i*) *Owen* v. *Legh*, 3 B. & Ald. 473.

(*k*) *Loring* v. *Warburton*, 28 Law J., Q. B. 31. *Johnson* v. *Upham*, ib. 252.

(*l*) *Glynn* v. *Thomas*, 11 Exch. 878.

respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain (*m*); but it does not follow, that because the tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods (*n*).

Power of sale of growing crops and things fraudulently removed—Tender before sale.—The statute 11 Geo. 2, c. 19, which enables landlords to distrain things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons appurtenant, or in anyways belonging to the demised premises and growing crops (ante, p. 447), enacts that it shall be lawful for the landlord in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured, and made, and not before; but it is enacted (s. 8), that if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured, or gathered, the tenant or lessee, his executors, &c. shall pay to the landlord, or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress; that then, and upon such payment, or lawful TENDER thereof actually made, whereby the end of such distress will be fully answered, the same shall cease, and the crops and produce distrained shall be delivered up to the tenant.

Notice of distress is not essential at common law to the validity of the distress (*o*). It has been expressly laid down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (*p*); but statute 2 Wm. & Mary, c. 5, s. 1, requires, as we have seen (ante, p. 447), notice of the distress to be given preparatory to a sale by the landlord, and the stat. 11 Geo. 2, c. 19, authorising the distress and sale of goods fraudulently removed (ante, p. 448), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (ante, p. 446), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

(*m*) *Hatch* v. *Hale*, 15 Q. B. 15; 19 Law J., Q. B. 289.

(*n*) *Boulton* v. *Reynolds*, 29 Law J., Q. B. 11; 8 W. R. 62.

(*o*) *Trent* v. *Hunt*, 9 Exch. 20.

(*p*) 1 Roll. Abr. 674, DISTRESS, pl. 1. *Tancred* v. *Leyland*, 16 Q. B. 680.

As the tenant is to have five days, under the stat. of Wm. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken (*q*). A written notice of distress is not invalidated by a statement that the rent is due to A, whereas it is due to B, provided B has authorised the distress (*r*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant (*s*).

Appraisement and sale.—If the tenant, after he has received notice of the distress, neglects for five days, to be reckoned exclusively both of the day of distress and the day of sale, to pay the rent, the lessor or distrainor may cause the goods to be appraised in the mode appointed by the statute (ante, p. 455), and may afterwards sell them for the best price that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale (*t*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. The schedule of the statute 57 Geo. 3, c. 93, regulating the costs of appraisements, "whether made by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two sworn appraisers (*u*). If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular (*x*). If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay and straw must sell it in the ordinary way for the best price. If he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling at the best price (*y*).

Costs and expenses.—By 57 Geo. 3, c. 93, it is enacted, that no persons making any distress for rent under 20*l.* shall take or receive out

(*q*) *Wakeman* v. *Lindsey*, 14 Q. B. 625; 19 Law J., Q. B. 166. *Kerby* v. *Harding*, 6 Exch. 234; 20 Law J., Exch. 163.

(*r*) *Trent* v. *Hunt*, 9 Exch. 14.

(*s*) *Bishop* v. *Bryant*, 6 C. & P. 484.

(*t*) *Robinson* v. *Waddington*, 18 Law J., Q. B. 250. The marginal note in 13 Q. B. 753, is incorrect.

(*u*) *Allen* v. *Flicker*, 10 Ad. & E. 640.

(*x*) *Westwood* v. *Cowne*, 1 Stark. 172.

(*y*) *Ridgway* v. *Ld. Stafford*, 6 Exch. 404; 20 Law J., Exch. 226.

of the produce of the things distrained and sold any more than the following costs and charges: *i.e.* for levying the distress, 3*s.*; for the man in possession, 2*s.* 6*d.* per day; for the appraisement, 6*d.* in the pound, with the amount of the stamp; for advertisements, 10*s.*; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1*s.* in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20*l.* (*z*). When the rent distrained for exceeds 20*l.*, the costs are not limited to any particular amount or fixed scale of charge, but they must be fair and reasonable (*a*).

Effect of non-compliance with the statutes authorising the sale.—The statute 11 Geo. 2, c. 19, s. 19, recites that it hath sometimes happened that upon a distress made for rent justly due, the directions of the statute 2 W. & M. c. 5, for enabling the sale of goods distrained for rent, have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent, and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken, for which the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him, the plaintiff hath recovered the full value of the rent for which the distress was taken; it is enacted, that where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio*; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more.

The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainor is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that autho-

(*z*) 1 & 2 Ph. & M. c. 12, s. 2. *Child* v. *Chamberlain*, 5 B. & Ad. 1049.
(*a*) *Lyon* v. *Tomkies*, 1 M. & W. 603.

rity, yet the act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Wherever the damages are merely nominal the defendant is entitled to a verdict (*b*). Where, therefore, the plaintiff in his declaration complained of the sale of his goods within five days, and proved that they were sold too soon, but there was no evidence to show that he had sustained any damage thereby, it was held that the judge ought to direct a verdict for the defendant (*c*). But this statute, as we have seen, does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer door, and where, consequently, no valid distress has ever been effected (*d*).

Keeping of the distress without selling.—It has generally been considered that the words in the statute 2 Wm. & Mary, c. 5, "shall and may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to appraise and sell, if the tenant does not replevy within the five days, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to appraise and sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention (*e*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (ante, p. 433), and he could only be made responsible for not selling in an action founded upon the statute. The landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent (*f*).

Indemnification of bailiffs.—We have already seen that if a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation (*g*).

A distress for rent affirms the continuance of the tenancy up to the day when the rent distrained for became due (*h*).

(*b*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 Law J., C. P. 220.

(*c*) *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 Law J., Exch. 248.

(*d*) *Attack* v. *Bramwell*, ante, p. 450.

(*e*) *West* v. *Nibbs*, 4 C. B. 186. *Glynn* v. *Thomas*, 11 Exch. 870. *Rodgers* v. *Parker*, 18 C. B. 112.

(*f*) *Jones* v. *Sawkins*, 5 C. B. 142.

(*g*) *Rawlings* v. *Bell*, 1 C. B. 959. *Ibbett* v. *De La Salle*, 6 H. & N. 237; 30 Law J., Ex. 44.

(*h*) *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 Law J., C. P. 220.

SECTION II.

OF DISTRESS DAMAGE FEASANT.

Seizure and impounding of animals and chattels damage feasant.—Every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his land, and detain them until he is tendered or paid a fair compensation for the injury. The distress must be taken at the time the damage is done, for if the damage was done yesterday, and the distress taken to-day, that would be illegal (*i*). "If, therefore, a man coming to distrain beasts damage feasant sees the beasts on his ground, and the owner of the beasts, or his servants, chases them out before the distress be taken, though it be of purpose to prevent the distress, yet the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distress. A man may, therefore, distrain cattle damage feasant in the night, for otherwise, perhaps, the cattle will be gone before he can take them."

"If a man takes my cattle and puts them into the land of another man, the tenant of the land may take these cattle damage feasant, though I, who was the owner, was not privy to the cattle's being damage feasant; and he may keep them against me until he has obtained satisfaction of the damages."

A commoner may justify the taking of the cattle of a stranger upon the land damage feasant. And if a man hath a right of common for ten cattle, and he puts in more, the surplusage above the ten may be distrained damage feasant. If many cattle are doing damage, a man cannot take one of them as a distress for the whole damage, but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest (*k*). If cattle get out of the close before the party coming to distrain has got into it, they cannot be followed and distrained off the land (*l*).

The lord may distrain in respect of injuries done to his soil, and to his hedges, fences, and trees, although he has no interest in the herbage (*m*).

Right to distrain animals trespassing and doing damage on unfenced lands adjoining public highways.—If the owner of lands adjoining a highway is bound by statute or prescription (ante, pp. 102, 223) to fence against the highway, and he neglects to do so, and cattle, whilst passing along

(*i*) *Wormer* v. *Biggs*, 2 C. & K. 31. *Lindon* v. *Hooper*, Cowp. 416.

(*k*) Gilbert on Distress, 4th edit. p. 22. Co. Litt. 161a. Bac. Abr. DISTRESS, F.

(*l*) *Clement* v. *Milner*, 3 Esp. 95. *Wormer* v. *Biggs*, 2 Car. & Kirw. 33.

(*m*) *Hoskins* v. *Robins*, 2 Wins. Saund. 327a.

the highway under the care of the owner or his servants, stray therefrom into the adjoining land, and do damage there, the owner of such adjoining land, who has brought the mischief on himself by neglecting to fence, has no right to distrain the cattle, unless they are abandoned and left there by the owner or his servants an unreasonable time. And if a man who has land adjoining a highway plants tempting green crops close adjoining the highway, and neglects to fence them off therefrom, so that cattle being driven along the public thoroughfare are irresistibly invited to trespass on the adjoining land through the operation of the tempting food upon their natural instincts (ante, p. 223), the owner of such adjoining land who has so neglected to fence has no right to distrain the trespassing animals, unless the drovers who have charge of them fail in their duty in endeavouring to prevent them from trespassing and from continuing on the adjoining land (*n*). If the owner of the cattle has intrusted them to be driven by incompetent boys, or has neglected to send a sufficient number of drovers, and is therefore in default himself, he will be responsible for the damage done by his trespassing cattle, although the owner of the land was bound to fence against the highway, and had neglected to do so (ante, pp. 150, 223).

Whilst cattle are lawfully passing along a highway the owners of the cattle are, as we have seen, using the highway according to the dedication of the owner of the soil, and being there with his consent, they are occupying the highway; but if the cattle have strayed into the high road, and have passed therefrom into the adjoining close, they may be distrained there damage feasant, notwithstanding the owner of that close was bound to repair the fence between his close and the road, because the cattle were wrongfully on the road, and the owners were not occupying it so as to cast any obligation to repair the fence upon the distrainor, who is not bound to fence against trespassers (*o*).

If a landowner neglects to repair and maintain a fence which he is by law bound to repair, and by reason thereof his neighbour's cattle stray into his land, he has no right to distrain them damage feasant, as he is himself the occasion of the injury (*p*).

What things may be distrained damage feasant.—The right of the owner or occupier of land to seize and detain animals and chattels trespassing upon and doing damage to his land is restricted to such animals and chattels as are not in the actual possession and use, and under the personal care, of some human being (*q*). If a man rides upon my corn I

(*n*) *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 Law J., Exch. 298; 33 Law T. R. 284.

(*o*) *Manch. Sheff. & Linc. Rail. Co.* v. *Wallis*, 14 C. B. 213; 23 Law J., C. P. 85; ante, pp. 150, 223, 224.

(*p*) *Singleton* v. *Williamson*, 31 Law J., Exch. 17; 7 H. & N. 410.

(*q*) Gilbert on Distress, 4th edit. p. 21, ante, p. 443.

cannot take his horse damage feasant, for that would lead to a breach of the peace (*r*); neither can I take a horse and cart away from a man who is actually driving it, nor a horse or a dog which a man is leading by a string, nor any animal which is under the immediate control of the owner (*s*). It is not enough, however, to exempt a dog from seizure damage feasant, to allege that the dog was in the possession and under the personal care of the plaintiff, for that may be so and yet the dog may be running about trespassing, and may not be under his immediate control.

Where to a plea justifying the seizure of a dog damage feasant the plaintiff replied that the dog when taken was in the actual possession of the servant of the plaintiff, and was then under his personal care, and was being used by him, it was held that these allegations as applied to a dog were insufficient to establish such a possession and user as would exempt the dog from seizure. "The allegations," observes Patteson, J., "would be satisfied by proof that the dog was within sound of the servant's whistle, though the servant was out of sight" (*t*).

Shocks of corn may be taken damage feasant. If turves lie upon a common, damage feasant, a commoner may distrain them, but he cannot burn them. A greyhound may be distrained running after conies in a warren, and so may a ferret brought into a warren. If a man brings gins and nets through my warren I cannot take them out of his hand, but if men are rowing upon my water, and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets, and detain them as damage feasant, to stop their further fishing (*u*).

If domestic pigeons come upon land sown with corn, and eat up the corn, the occupier of the land is justified in shooting them, as he has no other means of taking them damage feasant (*x*).

Distress by railway companies of locomotive engines damage feasant.—All railway companies have a common-law right to distrain engines and carriages encumbering their railway and obstructing the right of passage along the line; and the provisions of the Railway Clauses' Consolidation Act, with respect to the introduction of engines upon the railway and the removal of improperly constructed engines, do not control or qualify this right, but give a cumulative remedy (*y*).

Tender of amends.—If the lord or his bailiff comes to distrain beasts damage feasant, and before the distress the owner of the beasts tenders sufficient amends, and the distrainor refuses it, the latter becomes a wrong-doer if he then distrains. Tender before the distress makes the

(*r*) 9 Vin. Abr. 121; DISTRESS, A, pl. 4.
(*s*) *Field* v. *Adames*, 12 Ad. & E. 649.
(*t*) *Bunch* v. *Kennington*, 1 Q. B. 680.
(*u*) Bac. Abr. DISTRESS, F.
(*x*) Ante, p. 224.
(*y*) *Ambergate, &c. Rail. Co.* v. *Mid. Rail. Co.*, 2 Ell. & Bl. 793.

distress tortious. Tender after the distress, and before the impounding, makes the detainer and not the taking wrongful. Tender after the impounding is of no avail, as the distress taken is then in the custody of the law (*z*).

The hazard of the sufficiency of the tender rests upon the wrong-doer whose cattle have trespassed, and not upon the party who has suffered by the trespass. If the latter, therefore, demands an exorbitant sum for compensation, that will not dispense with the necessity of a tender of a proper compensation, and will not relieve the owner of the trespassing cattle from the obligation of estimating and tendering at his own risk the proper amount of damage (*a*), for he, being the original wrong-doer, by suffering his cattle to trespass, is bound to tender the sum which he maintains to be sufficient, before he is in a position to complain of the exorbitant amount of compensation claimed. If he has tendered a sufficient sum before distress made, his remedy would be by replevin or action for a trespass, and if after the distress, but before impounding, an action for the unlawful detention of the things taken (*b*).

The statute 2 W. & M. c. 5, which enables landlords to sell things distrained for rent, does not extend to distresses damage feasant. Consequently they remain as they were at common law, mere pledges, and the sale of them will make the party distraining a trespasser *ab initio*, unless the sale was necessary to cover the expense of finding food and water for the animals distrained, and can be justified under 17 & 18 Vict. c. 60.

The distrainor must at his peril find a proper pound. Generally, the manor pound would be the proper place, but if that is not in a fit state he must find another. He cannot impound so as to injure or destroy the subject-matter of the distress (*c*).

Sale of impounded animals.—By 12 & 13 Vict. c. 92, s. 5, it is enacted, that every person who shall impound or confine any animal in any common pound or inclosed place shall provide it with food and water, and by 17 & 18 Vict. c. 60, s. 1, it is further enacted, that every person who has supplied such animal with food and water, shall be at liberty, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly in the public market, after having given three days' public printed notice thereof, and apply the produce of the sale in discharge of the value of such food and nourishment and the expenses of the sale, rendering the overplus to the owner of the animal. Where several beasts have been distrained and impounded damage feasant, the

(*z*) *Singleton* v. *Williamson*, 31 Law J., Exch. 287. *Thomas* v. *Harries*, 1 M. & Gr. 695; 1 Sc. N. R. 524. But tender in cases of distress for rent renders a subsequent sale unlawful, ante, p. 455.

(*a*) *Gulliver* v. *Cosens*, 1 C. B. 705.

(*b*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 Law J., Exch. 198.

(*c*) *Wilder* v. *Speer*, 8 Ad. & E. 547. *Bignell* v. *Clarke*, 5 H. & N. 485; 29 Law J., Exch. 257.

distrainor cannot justify the sale of each beast individually in discharge of the cost of its food and the expenses. Parties availing themselves of the statute must show that it was necessary to sell the number they did sell, or that they sold one, and that it did not produce enough, and then that they sold more. "The power is measured by the necessity of the case, and if the distrainor is obliged to keep the distress for an indefinite period, there is nothing to prevent him from selling from time to time to defray the expenses" (*d*).

By the Roman law, he who took the cattle of another person feeding in his ground, or doing any other damage, was responsible for any violence doing hurt to the cattle, or for driving them in any other manner than he would his own; and if he caused any damage to the cattle, he was bound to make it good (*e*).

Duties and responsibilities of pound-keepers.—It has been held, that if an officer charged with the performance of certain public duties does that which belongs to his office, and intermeddles no further, he shall not be liable for any precedent tortious act of which he could know nothing. A pound-keeper, therefore, who only does the duty of his office by impounding things brought to him, does not by detaining them in the pound render himself responsible for the unlawfulness of the distress. The pound-keeper is bound to take and keep whatever is brought to him, at the peril of the person who brings it, without any judgment, direction, examination, or warrant; and if the things have been wrongfully taken, the person bringing them to the pound, and not the pound-keeper, is responsible for the wrong. "It would be terrible," observes Ld. Mansfield, "if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable to another action for not letting them go" (*f*).

SECTION III.

REMEDIES FOR UNLAWFUL AND EXCESSIVE DISTRESSES.

Replevin of things distrained.—By the common law, whenever the goods of one man had been wrongfully distrained by another (not being a sheriff or his officer acting in execution of the process of a superior court), and the party out of whose possession the goods had been taken wished to have them restored to him, and to try the lawfulness of the seizure, he

(*d*) *Layton* v. *Hurry*, 8 Q. B. 819; 15 Law J., Q. B. 244.

(*e*) Domat. liv. 2, tit. 8, s. 2, § 6.

(*f*) *Badkin* v. *Powell*, Cowp. 478.

might get back his goods by giving security to the sheriff of the county to prosecute an action with success, and make out the injustice of the taking. The proceeding by which this was accomplished was called a replevin, or the getting back of a chattel taken and detained as a pledge or security, by substituting another pledge in the place of the thing taken (*g*).

The authorities all lay it down that replevin can only be maintained where goods are taken by one man out of the possession of another; not where they have been delivered upon a contract; and this is clear upon the form of pleading, which always is, that the defendant "took and detained" the goods, the plea to which allegation is *non cepit* (*h*).

Replevin does not lie for goods which were taken abroad, but are detained here (*i*), as the object of the proceeding is to restore the possession as it was before the taking.

The writ of replevin, observes Lord Redesdale, "is merely meant to apply to the case where A takes goods wrongfully from B, and B applies to have them redelivered to him upon giving security, until it shall appear whether A has taken them rightfully. But if A be in possession of goods and B claims a property, this is not the writ to try that right" (*k*). Where therefore a bailee, who had the lawful possession of chattels by delivery from the owner, placed the chattels in the hands of the defendant, who set up a lien upon them, and the plaintiff proceeded to replevy the goods and bring an action of replevin, it was held that he had mistaken his remedy and could not proceed by replevin, but should have proved his prior right in an action for detaining, or for wrongfully converting, the chattels. "The whole proceeding of replevin at common law," observes Coleridge, J., "is distinguished from that in trespass, in this, amongst other things, that while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure a restitution of the goods themselves, and this it effects by a preliminary ex-parte interference by the officers of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from the action of trespass by this, that at the time of declaring the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were originally taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant."

As a general rule, it is thought just that a party in the peaceable

(*g*) Co. Litt. 145b; Spelman, Gloss, 485; Gilbert on Replevins.
(*h*) *Galloway* v. *Bird*, 4 Bing. 301.
(*i*) *Nightingale* v. *Adams*, 1 Shower, 91.
(*k*) *Wilsons, in re*, 1 Sch. & Lef., 320, n.

possession of goods should remain undisturbed, either by the parties claiming adversely or by the officers of the law, until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it is thought just that even before any determination of the right the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision (*l*).

The proceedings in replevin were formerly originated by a writ sued out of the High Court of Chancery, by the party whose goods had been taken and directed to the sheriff of the county, commanding him to replevy the goods and to do justice in the matter. But the statute of Marlbridge (52 Hen. 3, c. 21), authorised the sheriff to replevy on his own authority, and without any suit in replevin, on complaint being made to him of the wrongful taking, and the requisite sureties and pledges being tendered (*m*). The recent statute, 19 & 20 Vict. c. 108, for amending the acts relating to the county courts, enacts (s. 63) that the powers and responsibilities of the sheriff with respect to replevins shall thenceforth cease; and the registrar of the county court of the district in which any distress subject to replevin is taken is empowered to approve of replevin bonds, and to grant replevins on security being given (ss. 65, 66), and to issue all necessary process in relation thereto to be executed by the high bailiff.

Replevin in the county court.—If the replevisor wishes to proceed in the county court, he must give security, to be approved of by the registrar, for the rent or damage in respect of which the distress was made and the costs in the county court, and must bind himself with sureties to commence an action of replevin against the distrainor in the county court of the district within which the distress was taken within one month from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods, if a return thereof shall be adjudged.

The action of replevin in the county court may be removed by *certiorari* into the superior court by the defendant, on security being given by him to the master conditioned to defend the action with effect, and to prove that the defendant had good ground for believing that title, &c. was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l*. An appeal from the decision of the county court is allowed where the amount of the rent or damage exceeds 20*l*., and in all actions where the parties have agreed to the jurisdiction.

(*l*) *Mennie* v. *Blake*, 6 Ell. & Bl. 851; 25 Law J., Q. B. 401.

(*m*) See the stat. West. 2, 13 Ed. 1, stat. 1.

Replevin cannot be joined with any other form of action in the county court (*n*).

Replevin in the superior courts.—The action of replevin may be commenced in any superior court, in the form applicable to personal actions therein. By 19 & 20 Vict. c. 108, s. 65, it is enacted, that if the replevisor shall wish to commence proceedings in any superior court, he shall at the time of replevying give security, to be approved of by the registrar of the county court, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the superior court; conditioned to commence an action of replevin against the distrainor in such superior court as shall be named in the security within one week from the date thereof, and to prosecute such action with effect and without delay, and unless judgment thereon be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded twenty pounds, and to make return of the goods if a return thereof shall be adjudged.

Actions of replevin of things distrained damage feasant, when tried in the county court, are to be tried in a summary way, as other actions in those courts holden under the authority of 9 & 10 Vict. c. 95 (*o*). Where the distress is for damage feasant, and the defendant in the county court is entitled to judgment for a return of the things distrained, the plaintiff is entitled to have the amount of the damage done found, and to have judgment found for the defendant in the alternative for a return of the distress, or for the amount of the damage so found (*p*).

Actions for unlawfully selling impounded animals and cattle.—To enable a party to avail himself of the power to sell impounded animals, given by 17 & 18 Vict. c. 60, s. 1 (ante, p. 463), it must be shown that the animals had been impounded by some party in the exercise or intended exercise of a right to distrain. The word "confined" in the statute does not apply to all takings and confinement of animals under all circumstances (*q*).

Actions for unlawful and excessive distresses.—If a landlord has distrained for rent, no rent being in arrear or due, the proper remedy is by action upon the statute for double the value of the things distrained (ante, p. 451). If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterwards made, would be either by replevin, or an

(*n*) *Mungean* v. *Wheatelcy*, 6 Exch. 88.
(*o*) County Court Rules, Rule 179, 2 Jur. N. S. 551.
(*p*) County Count Rules, R. 181; 2 Jur. N. S. 551, part 2.
(*q*) *Machell* v. *Ellis*, 1 C. & K. 685. *Mason* v. *Newland*, 9 C. L. P. 575.

action for a trespass, or for the wrongful seizure and conversion of the things distrained. If the tender is made after the distress, an action would be maintainable for the detention of the property (*r*). The mere retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him will not render the landlord liable to an action for a trespass. A landlord, therefore, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feazance in failing to deliver up the distress, he being required so to do, but his refusal may amount to evidence of a conversion (*s*).

If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress (*t*).

The wrongful seizure of beasts of the plough, or of the tools and implements of a man's trade, may be made the foundation of an action of trespass as well as of an action upon the case (*u*).

Parties to be made plaintiffs.—A person from whose possession goods and chattels have been taken is entitled to replevy them, and try the lawfulness of the taking. Thus, he who hath the goods of another pledged to him, or who hath the cattle of another to manure his land, has a sufficient property to maintain replevin (*x*). If the cattle of a *feme sole* be taken, and afterwards she marry, the husband alone must bring the action, for the cattle rest exclusively in the husband by the marriage; but if the goods taken are those which the *feme* has as an executrix, she may join with her husband in the replevin (*y*).

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*z*).

Parties to be made defendants.—If a servant, authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them, the master will not be responsible for the wrongful act (*a*). Where a landlord authorised his bailiff to distrain for rent due to him from his farm-tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the land-

(*r*) *Gulliver* v. *Cosens*, 1 C. B. 788. *Glynn* v. *Thomas*, 11 Exch. 878; ante, p. 455.

(*s*) *West* v. *Nibbs*, 4 C. B. 172.

(*t*) *Dawson* v. *Cropp*, 1 C. B. 961.

(*u*) *Nargett* v. *Nias*, 1 Ell. & Ell. 439; 28 Law J., Q. B. 143.

(*x*) Co. Litt. 145; Winch, 26; Bac. Abr. REPLEVIN, F. G.

(*y*) Sid. 172; Bro. Bar. & Feme, pl. 85; 2 Lev. 107. *Serres* v. *Dod*, 2 N. R. 405.

(*z*) *Fisher* v. *Algar*, 2 C. & P. 374. *Bail* v. *Mellor*, 19 Law J., Exch. 279. And see further as to parties to actions for the unlawful seizure and conversion, and unlawful detention of chattels, ante, pp. 304–307, 376–379.

(*a*) *Lyons* v. *Martin*, 8 Ad. & E. 512; ante, p. 21.

lord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure, or unless he meant to adopt the act of the bailiff at all hazards (*b*). But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence (ante, p. 20). And every landlord who gives a broker a general authority to distrain is responsible if the broker exceeds his authority, by distraining things which are not distrainable (*c*), or sells goods without having them duly appraised (*d*); but a landlord who does not personally interfere in making a distress is not liable for the neglect of the broker in not delivering a copy of the charges, &c., pursuant to the statute (*e*).

All persons who aid, or counsel, or direct, or join in a trespass, are, as we have seen, joint-trespassers, but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. Where, therefore, one of several partners signed a distress-warrant in his own name on behalf of the firm, it was held that this was no proof that the distress was authorised by the firm, so as to render the other partners responsible for it. It must be shown, either by evidence before the transaction that they all joined in ordering the distress, or by evidence afterwards that they concurred in and received the benefit of it (*f*).

Declarations in replevin simply set forth that in a certain dwelling-house, or in a certain close or common, in a certain named parish and county, the defendant took certain cattle or goods and chattels of the plaintiff (describing them), and that the plaintiff unjustly detains them against sureties and pledge until, &c., claiming damages.

Declarations for a wrongful and excessive distress.—If beasts of the plough or the tools of a man's trade have been wrongfully distrained, there being other goods of sufficient value on the demised premises to satisfy the rent, the ordinary declaration for a trespass in seizing and taking away the plaintiff's chattels correctly describes the true cause of action (*g*). Declarations for an excessive distress usually set forth the tenancy between the plaintiff and defendant, the amount of rent payable, the levy of the distress for certain arrears of rent, and the amount of such arrears, averring that one-half or one-third part, as the case may be, of the goods so distrained would have been of sufficient value to have satisfied the arrears of rent, and the costs and charges of the distress and of the appraisement and sale thereof, and that the defendant thereby took an

(*b*) *Lewis* v. *Read*, 13 M. & W, 837; *Freeman* v. *Rosher*, 13 Q. B. 780.
(*c*) *Gauntlett* v. *King*, 3 C. B., N. S. 59.
(*d*) *Haseler* v. *Le Moine*, 7 W. R., C. P. 14.
(*e*) *Hart* v. *Leach*, 1 M. & W. 560.
(*f*) *Petrie* v. *Lamont*, Car. & M. 96; ante, pp. 21, 171, 307.
(*g*) *Nargatt* v. *Nias*, 28 Law J., Q. B. 146; 5 Jur. Q. B., N.S. 198.

excessive and unreasonable distress for the said arrears of rent, contrary to the form of the statute in that behalf made; claiming a certain specified sum as damages.

Selling under value is a distinct ground of complaint, and ought to be distinctly stated on the face of the declaration if the plaintiff means to rely upon it (*h*). A plaintiff cannot, therefore, under the common count for an excessive distress, show that the defendant had distrained for and sold goods exceeding the rent due, and a count for such a cause of action will not be allowed to be added at the trial, where it does not appear to have been a matter in dispute between the parties at the commencement of the action (*i*).

Declarations for a second distress for the same rent (ante, p. 453) should show that the defendant took and distrained the goods of the plaintiff for rent then alleged to be due to him in respect of certain premises in the occupation of the plaintiff, that the goods then on the premises were more than sufficient in value to have satisfied the whole of the rent then due, and the costs and charges attending the distress and sale of the goods distrained, but that the defendant, nevertheless, wrongfully made a second distress on the goods and chattels of the plaintiff on the said premises for the same rent, which ought to have been satisfied under the first distress, and wrongfully converted and disposed of the said last-mentioned chattels to his own use, whereby the plaintiff was injured in his credit and circumstances, &c. (*k*).

Declarations for distraining and selling goods where no rent was due, and to recover double value, after setting forth the tenancy between the plaintiff and the defendant, the rent payable by the plaintiff to the defendant, the wrongful seizure upon the demised premises of certain specified goods and chattels of the plaintiff, of a certain specified value, by way of a distress for certain named arrears of rent then pretended by the defendant to be due from the plaintiff to the defendant by virtue of the said demise, proceed to aver a wrongful sale of the said goods and chattels, showing that at the time of the making of the said distress and sale no rent was due to the defendant in respect of the demised premises; claiming a certain sum, as double the value of the goods distrained.

Declarations for distraining and selling goods without notice of distress, or without appraisement, or for not selling for the best price.—A good cause of action may be shown by a declaration which alleges that the defendant wrongfully seized divers goods and chattels of the plaintiff (enumerating them), of a certain specified value, then being upon certain premises of the defendant, as and for a distress for rent claimed by the defendant to be in arrear and due from the plaintiff to the defendant for the said pre-

(*h*) *Thompson* v. *Wood*, 4 Q. B. 498. 27 Law J., Exch. 246.
(*i*) *Lucas* v. *Tarleton*, 3 H. & N. 116; (*k*) *Smith* v. *Goodwin*, 4 B. & Ad. 413.

mises, and afterwards wrongfully sold the said goods and chattels, without having given to the plaintiff a notice of the said distress and of the cause of taking the same, or left such notice at the chief mansion-house or other most notorious place on the said premises;—or wrongfully sold the said goods and chattels, without causing them to be duly appraised by two sworn appraisers (*l*);—or wrongfully sold the said goods and chattels for much less than the best price that could be gotten for them, had they been sold with reasonable care and diligence.

Pleas in replevin—Non cepit.—Pleas in replevin are generally either pleas in bar, or in justification, or by way of cognizance, or by way of avowry. The defendant may either avow or justify, at his election. The general issue in replevin is *non cepit*, and this may be pleaded by one of several defendants. It is a simple traverse of the allegation in the declaration in replevin of the taking of the chattels, and merely alleges that the defendant did not take the cattle or the goods and chattels in the declaration mentioned. This is the proper plea when the defendant denies that he was the party distraining, or that he distrained in the place described in the declaration. If the defendant wishes to dispute the plaintiff's property in the goods, he must plead a plea specially alleging that the goods and chattels in the declaration mentioned were, at the said time when, &c., the property of the defendant, or of some named third party, and not the property of the plaintiff (*m*).

Under a plea of *non cepit* in an action of replevin the defendant may, under the Municipal Corporations Act, show that he was a constable appointed for a borough, and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen (*n*).

Avowries in replevin.—By 11 Geo. 2, c. 19, s. 22, it is enacted, that all defendants in replevin may avow or make cognizance generally that the plaintiff or other tenant of the lands and tenements whereon a distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for accrued, which rent was then due, and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor.

The common avowry or cognizance should show that the tenancy continued up to the time of the making of the distress (*o*). If the tenancy was determined at the time of the distress, but the tenant still continued in possession, and the distress was founded on 8 Anne, c. 14

(*l*) *Bishop* v. *Bryant*, 6 C. & P. 484.
(*m*) Com. Dig. PLEADER, 3 K. 11. *Dover* v. *Rawlings*, 2 Mood. & Rob. 544.
(*n*) *Mellor* v. *Leather*, 1 Ell. & Bl. 619; 5 & 6 Wm. 4, c. 76, s. 76; post, ch. 12, s. 1.
(*o*) *Williams* v. *Stiven*, 9 Q. B. 14.

(ante, p. 437), the avowry should be based on that statute. After setting forth the tenancy, the amount of rent in arrear, the time when it became due, &c. (*p*), the avowry or cognizance avows generally that the defendant took the cattle, goods, and chattels in the close in the declaration mentioned, as and for a distress for the rent due and in arrear, or that he took them as bailiff of the landlord. The landlord who authorised the distress, and the bailiff who seized by his directions, may both join in making the common avowry and cognizance.

The general form of avowry, authorised by 11 Geo. 2, c. 19, s. 22, applies to rents only; but penalties for breaches of covenants respecting the cultivation of the demised premises granted by deed to be levied by distress may be treated as a rent (*q*).

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death, such distress, though made before probate, having been afterwards adopted and ratified by the executor (*r*).

Avowries for double rent, under the statute 11 Geo. 2, c. 19, s. 18 (ante, p. 471), should show the nature of the tenancy: that the tenant had power to determine it by giving notice to quit; that he did give notice to quit at a time mentioned in such notice; that the tenancy became thereby determined; that the defendant did not deliver up possession at the time mentioned in such notice, and then became liable to pay double the rent which he would otherwise have paid; that a certain specified sum, being half a year, or three quarters of a year, of such double rent, became due, and that the plaintiff took the goods in the declaration, mentioned as and for a distress for such rent (*s*).

Avowries by joint-tenants, coparceners, and tenants-in-common.—We have seen that any one of several coparceners and co-heirs in gavelkind who has levied a distress may avow and justify the distress in his own right, and make conusance as the bailiff of the others, without averring or proving any express authority from them to distrain (ante, p. 439). If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conusance (*t*). Tenants-in-common, on the other hand, must avow the taking of the distress in respect of their several shares. Thus, if three tenants-in-common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more (*u*). But one of several tenants-in-common may, as we have seen, distrain and avow for his own share of the rent (ante, p. 438).

(*p*) *Roskruge* v. *Caddy*, 7 Exch. 840.
(*q*) *Pollitt* v. *Forrest*, 11 Q. B. 967.
(*r*) *Whitehead* v. *Taylor*, 10 Ad. & E. 210.
(*s*) *Humberstone* v. *Dubois*, 10 M. & W. 765. Addison on Contracts, 363, 364, 5th ed.
(*t*) *Stedman* v. *Bates*, 1 Salk. 389.
(*u*) Litt. sec. 314–317. *Philpott* v. *Dobbinson*, 3 M. & P. 320.

Pleas in bar to an avowry—Non tenuit—Riens in arrere.—The plaintiff may, by a plea in bar, deny generally all the allegations contained in the avowry (*x*), unless he is compelled by a judge's order, under the provisions of the Common Law Procedure Act, to traverse separately the tenancy, the fact of the rent being in arrear, or the authority to distrain. The plea of *non tenuit* is a traverse of the demise stated in the avowry. It alleges that the plaintiff did not hold the said messuage or tenement, land and premises, under the alleged demise thereof in the avowry mentioned. Under this plea it may be shown that the tenure alleged in the avowry was extinguished and put an end to before the time of the distress, either by twenty years' adverse possession under the statute of limitations (*y*), or by a transfer of the landlord's reversionary estate to an assignee or mortgagee who has demanded the rent (*z*).

The plea of *riens in arrere* simply alleges that no part of the rent alleged in the avowry to be in arrear was in arrear. Under this plea payments made to a ground landlord, or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress, may be given in evidence in reduction of the rent, as such payments are always presumed to be authorised by the landlord, he being obliged to protect the tenant from them, and are treated as payments of rent by the tenant (*a*). But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by the landlord (*b*). The meaning of the plea of *riens in arrere* is, that the plaintiff at the time of the distress was in arrear to nobody; and if he has not paid anybody, he cannot, under this plea, contest the defendant's right to the rent (*c*).

Payment of money into court.—If goods have been taken in closes A and B, and the defendant can justify as to part of the taking in A, but not as to the taking in B, as, for instance, if B was not part of the demised premises, the defendant may give up the case wholly as to B, by paying money into court in respect of the goods there taken, and partially as to A, by paying in respect of those which he does not propose to justify the taking, and making avowry as to the residue (*d*).

Of the plea of Not guilty "by statute" in actions of trespass, or upon the case for an unlawful distress.—By the statute 11 Geo. 2, c. 19, s. 21, it is enacted, that in all actions of trespass, or upon the case against persons entitled to rents or services, their bailiffs or other persons, relating to any

(*x*) *Trent* v. *Hunt*, 9 Exch. 20.
(*y*) *De Beauvoir* v. *Owen*, 5 Exch. 177.
(*z*) *Wheeler* v. *Branscombe*, 5 Q. B. 379.
(*a*) *Jones* v. *Morris*, 3 Exch. 746.
(*b*) *Davies* v. *Stacey*, 12 Ad. & E. 511.
(*c*) Wightman, J., *Wheeler* v. *Branscombe*, 5 Q. B. 379.
(*d*) *Lambert* v. *Hepworth*, 2 Q. B. 729; 3 & 4 Wm. 4, c. 42, s. 21. As to payment into court generally, see post, ch. 21.

entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute" (*e*). Under the plea of Not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea (*f*). The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods (*g*).

A plea of justification of trespass on the ground that the plaintiff had a right to distrain, must show that the plaintiff had such an estate and interest in the premises as would entitle him to distrain (*h*); or that he had some express authority or license to distrain. The common avowry of a distress for rent does not set out title, because the statute 11 Geo. 2, c. 19, s. 22, gives a statutory form, and therefore a lawful demise is implied, but that statute is confined to actions for replevin.

Pleas justifying an entry upon land for the purpose of distraining goods fraudulently removed, should set forth the fact of the tenancy, of rent being in arrear, and of the fraudulent removal of the goods by the tenant from the house demised to him by the defendant, in order to prevent the defendant from distraining the goods, and the deposit of the goods in the plaintiff's house with his privity and consent, and should then go on to justify the entering the house in order to seize the goods under the provisions and in the mode prescribed by the statute 11 Geo. 2, c. 19, s. 1 (*i*).

Pleas justifying the seizure of animals damage feasant, should set forth the defendant's possession of a close or of land whereon certain cattle of the plaintiff were trespassing and doing damage, and that the defendant thereupon took the cattle by way of a distress for the damage, and drove them to a common pound and there impounded them, and that this act of the defendant is the injury complained of by the plaintiff in his declaration (*k*). If the plaintiff's cattle strayed from a high road into the defendant's close, through the defendant's neglect to repair fences, which he was bound by statute or prescription to repair, this must be replied specially by a replication, alleging that the cattle were lawfully using the highway;

(*e*) Reg. Gen. Hil. Term, 16 Vict. R. 21; 1 Ell. & Bl. App. lxxxiii.

(*f*) *Eagleton* v. *Gutteridge*, 11 M. & W. 469.

(*g*) *Williams* v. *Jones*, 11 Ad. & E. 643; and see post, ch. 21.

(*h*) *Pinhorn* v. *Souster*, 8 Exch. 138.

(*i*) See the forms in *Norman* v. *Wescombe*, 2 M. & W. 349. *Rich* v. *Woolley*, 7 Bing. 651. *Bowler* v. *Nicholson*, 12 Ad. & E. 341.

(*k*) *Bond* v. *Downton*, 2 Ad. & E. 26.

that it was the duty of the defendant to have fenced against the highway, and that he neglected so to do (*l*).

Pleas of a recovery of the goods in an action of replevin.—A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods, and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy (*m*).

Evidence at the trial—Proof of distress.—In order to establish the fact of a distress having been made by the defendant upon the goods and chattels of the plaintiff, it is not necessary to prove an actual seizure of the plaintiff's goods. If the landlord's agent goes upon the plaintiff's premises, and declares that he has come to distrain for rent, and that nothing shall be removed, this, as we have seen, is evidence of the making of a distress, though no single article is touched by such agent (ante, p. 449). Where a warehouse-keeper or lodging-house keeper refused to let the goods and chattels of his tenant or lodger be removed until rent claimed by him to be due was paid, this was held to be evidence of the making of a distress (ante, p. 450). Where the defendant's broker appeared upon the plaintiff's premises, and said, "Unless you pay me 21*l.* for rent and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defendant's mouth, after receiving the money, to say there was no distress (*n*).

Proof of no rent being due, and of unlawful and excessive distresses.—If the plaintiff sues the defendant on the statute for distraining when no rent was due, he must prove that he held the land on which the distress was taken as tenant to the defendant, and must in general produce and prove the lease, if he holds under a written demise. If the lease is in the hands of the landlord, he should give the latter notice to produce it; he should then prove the amount of the rent, the period at which it became payable, and that it had been paid to and received by the landlord or his authorised agent, at the time of the levy of the distress. If the plaintiff complains of the wrongful seizure of goods not distrainable, he must prove the nature and character of the goods seized, and that they were privileged from distress (ante, pp. 441–444), and it is for the defendant to show any circumstances rendering the distress in the particular instance lawful, such as that there were no other distrainable goods on the demised premises sufficient to satisfy the rent (ante, p. 441). If the plaintiff complains of an excessive distress, he must prove the tenancy;

(*l*) *Goodwyn* v. *Cheveley*, 4 H. & N. 631.

(*m*) *Phillips* v. *Berryman*, 2 Doug. 288; post, ch. 21.

(*n*) *Hutchins* v. *Scott*, 2 M. & W. 811.

the amount of rent payable to the defendant; the value of the goods distrained, and that some actual or special damage has been sustained from the defendant's having distrained and taken an unreasonable quantity of the plaintiff's goods. It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (ante, p. 451), and must be productive of actual loss or damage to the plaintiff (*o*).

If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress (*p*), or that the defendant sold the things distrained, and realised by the sale of them more than was sufficient to satisfy the rent really due with the costs of the distress (*q*). A distress may, as we have seen, be excessive, although the goods when sold may realise less than the rent and expenses (*r*).

Proof of material averments in the declaration.—The statement in a declaration for an unlawful distress of the name of the party to whom the rent distrained for is due, is material, and must be proved as laid (*s*). But it is not necessary to prove the precise amount of rent alleged in the declaration to be due (*t*).

Proof that the defendant ordered or authorised the distress.—In order to prove that the distress was made by the order or authority of the defendant, the warrant should, if the distress was authorised by warrant in writing, be produced and proved, or a notice to produce it should be given to let in secondary evidence of it; but it is not necessary, as we have seen, to prove the warrant in order to fix the defendant as the author of the unlawful proceeding. His conduct, and acts, and admissions in the matter are evidence against him, although he has clothed his agent with an authority in writing. If he has received the money realised by the distress (ante, p. 469), or has personally interfered with the impounding or sale of the goods, or has ratified and adopted the act of the broker levying the distress, these circumstances are admissible in evidence against him, to show that he ordered or authorised the distress (post, ch. 20, s. 2).

We have already seen that a warrant from a landlord to a bailiff to distrain the goods of A, does not render the landlord responsible for a wrongful seizure by the bailiff on the adjoining land of B of the goods of B, and that a landlord's warrant to distrain chattels does not render the landlord responsible for a wrongful seizure of fixtures, as in neither of

(*o*) *Lucas* v. *Tarleton*, 3 H. & N. 120; 27 Law J., Exch. 246. *Piggott* v. *Birtles*, 1 M. & W. 450.

(*p*) *Glynn* v. *Thomas*, 11 Exch. 878; 25 Law J., Exch. 125.

(*q*) *Tancred* v. *Leyland*, 16 Q. B. 680. *French* v. *Phillips*, 1 H. & N. 507.

(*r*) *Smith* v. *Ashforth*, ante, p. 452.

(*s*) *Ireland* v. *Johnson*, 1 Bing. N. C. 166.

(*t*) *Gwinnett* v. *Phillips*, 3 T. R. 643. *Sells* v. *Hoare*, 8 Moore, 454.

these cases has the landlord given any authority for the doing of the wrongful act (ante, pp. 468, 469).

When proof of special damage is necessary.—We have already seen that the statute 11 Geo. 2, c. 19, s. 19, provides that where a distress has been made for rent justly due, and an irregularity or unlawful act has afterwards been committed by the distrainor or his agents, the distress is not to be deemed unlawful, nor the parties making it trespassers *ab initio*, but that the party aggrieved by the unlawful act or the irregularity, may recover full satisfaction for the special damage he has sustained and no more (ante, p. 548), and that to enable a tenant to maintain an action against his landlord for an irregularity in selling goods distrained, it must be proved that he has sustained actual damage from the wrongful act, and if no such proof is forthcoming, it is the duty of the judge to direct a verdict for the defendant (*u*).

Proof of waiver of right of action.—A right of action for an unlawful or excessive distress once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done. A tenant, therefore, does not waive his right of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized (*x*).

Proof of tenancy, as between plaintiff and defendant, if not admitted upon the record, may be established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced (*y*). Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the party receiving the rent, notwithstanding the existence of a written contract of demise between them not produced (*z*). And "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord" (*a*). But payment of rent under a distress is not a conclusive admission of the title of the distrainor. Counter-evidence may be given on the part of the defendant to show that he never had any title (*b*).

Proof of payment of rent by a tenant to an agent of the landlord who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the

(*u*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 Law J., C. P. 220. *Lucas* v. *Tarleton*, 3 H. & N. 116.

(*x*) *Willoughby* v. *Backhouse*, 2 B. & C. 821. *Baylis* v. *Usher*, 4 M. & P. 790; 7 Bing. 153.

(*y*) *Rex* v. *Hull*, 7 B. & C. 611; 1 M. & R. 448.

(*z*) *Doe* v. *Morris*, 12 East, 237, 239, n.

(*a*) *Panton* v. *Jones*, 3 Campb. 372. *Cooper* v. *Blandy*, 4 M. & Sc. 560; 1 Bing N. C. 45.

(*b*) *Knight* v. *Cox*, 18 C. B. 645.

latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another party (*c*). But proof of payment of rent to a particular individual claiming to be entitled to receive it, is only *primâ facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation (*d*).

Proof of an attornment by the tenant to a receiver appointed by the Court of Chancery, is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property (*e*).

Proof of the nature and terms of a tenancy will best be effected by production of the written demise, where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which, it becomes due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents (*f*). The old rule of law, that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has recently been held that whatever a party says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced (*g*). Where, therefore, a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held (*h*).

Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, and the tenant entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory (*i*).

Damages recoverable — Double value. — By 2 W. & M. sess. 1, c. 5, s. 5, it is enacted, that if any distress and sale be made by virtue and under colour of that act for rent pretended to be arrear and due, where

(*c*) *Hitchings* v. *Thompson* 5 Exch. 54.
(*d*) *Fenner* v. *Duplock*, 9 Moore, 40.
(*e*) *Evans* v. *Matthias*, 7 Ell. & Bl. 590; 26 Law J., Q. B. 309.
(*f*) Post, ch. 21.
(*g*) *Slatterie* v. *Pooley*, 6 M. & W. 668. *Boulter* v. *Peplow*, 9 C. B. 493; 19 Law J., C. P. 193. *Earle* v. *Picken*, 5 C. & P. 542.
(*h*) *Howard* v. *Smith*, 3 M. & Gr. 254; 3 Sc. N. R. 574.
(*i*) *Ld. Bolton* v. *Tomlin*, 5 Ad. & E. 863.

no rent is arrear or due to the person distraining, the owner of the goods distrained and sold may by action of trespass, or upon the case against the person distraining, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute for the seizure and sale of goods for rent pretended to be in arrear and due, when in truth no rent is in arrear or due to the person distraining, and the plaintiff claims double the value of the goods distrained, the jury should be directed, if they find for the plaintiff, to ascertain in the first place the actual value of the goods, and then to give damages to the plaintiff to the amount of double the value. If the jury assess the damages generally at a certain sum, and it turns out that they have assessed only the actual value or the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute (*k*).

Whenever the landlord has distrained, without any right or authority to distrain, there is a trespass upon, and injury to the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceable possession of his house, as well as for the unlawful seizure of his goods.

The damages recoverable where the entry upon the premises was effected in an unlawful manner, and the parties had no right to touch the goods after they had entered, by reason of the trespass in entering, are the same as would be recoverable from a stranger who had broken and entered the house without any colour of authority, and it does not lie in the plaintiff's mouth to say in mitigation of damages, that he has sold the goods, and applied the proceeds of the sale in satisfaction and discharge of the rent (*l*).

Recovery of special damage. — We have already seen that by the express terms of the statute 11 Geo, 2, c. 19, s. 19, the party injured by an unlawful act committed after a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where there is no difference, or it is proved that the crops were sold for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict (*m*).

(*k*) *Masters* v. *Farris*, 1 C. B. 716; post, ch. 21. RECOVERY OF DOUBLE AND TREBLE DAMAGES.

(*l*) *Attack* v. *Bramwell*, 32 Law J., Q. B. 146.

(*m*) *Rodgers* v. *Parker*, 18 C. B. 112. *Lucas* v. *Tarleton*, 3 H. & N. 116. *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

In an action for selling goods distrained for rent without an appraisement, and without complying with the provisions of 2 Wm. and M., sess. 1, c. 5 (ante, p. 459), the measure of damages is the real value of the goods sold minus the rent. The wrong-doers cannot get off by handing over to the plaintiff the mere proceeds of the sale (*n*).

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount" (*o*).

Where the plaintiff in his declaration for a wrongful distress claimed damages for the loss of divers lodgers, without naming any, Lord Ellenborough refused to allow him to prove that he had in fact lost a lodger, because the name of the lodger had not been specified in the declaration (*p*).

If the landlord takes some things that are distrainable, and other things which are not, this does not render the distress wrongful *ab initio*; but the wrong is limited to the seizure of the goods which were not distrainable, and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels (*q*). In respect of the things not distrainable, the distrainor is a trespasser *ab initio*, and the full value of them is recoverable (*r*).

(*n*) *Knight* v. *Egerton*, 7 Exch. 407. *Biggins* v. *Goode*, 2 Cr. & J. 367. *Whitworth* v. *Maden*, 2 C. & K. 517.

(*o*) *Piggott* v. *Birtles*, 1 M. & W. 451.

(*p*) *Westwood* v. *Cowne*, 1 Stark. 172.

(*q*) *Harvey* v. *Pocock*, 11 M. & W. 740.

(*r*) *Keen* v. *Priest*, 4 H. & N. 236; 28 Law J., Exch. 157. *Attack* v. *Bramwell*, ante p. 450. See further as to damages, post, ch. 22.

CHAPTER XII.

OF ASSAULT AND BATTERY, AND WRONGFUL IMPRISONMENT.

SECTION I.—*Of assault and battery, and mayhem.*—What constitutes an assault—Assaults resulting from negligence—Assaults by constables—Handcuffing unconvicted prisoners—Assault and battery—Mayhem and wounding—Excusable and justifiable assaults—Self-defence—Defence of the possession of a house or close, or of property—Resistance to a forcible entry—Preservation of the public peace—Battery and wounding in self-defence, or in defence of the possession of tenements or chattels.

SECTION II.—*Of false imprisonment.*—Constructive imprisonment—Arrest by warrant of justices—Arrest by constables, peace-officers, and private individuals, without warrant—Arrest for a misdemeanour—Arrest of the wrong party—Arrest for malicious injuries to property and certain indictable offences—Arrest for the purpose of preserving the public peace—Arrest of persons disturbing divine service, of vagrants, and indecent persons—Arrest under the Merchant Shipping Acts—Of a principal by his bail—Arrest for offences within the metropolitan police district—Arrest by servants of railway companies—Detention of deserters—Imprisonment of lunatics.

SECTION III.—*Of actions for an assault and battery, and for false imprisonment.*—Statutory protection of constables and their assistants from vexatious actions—Limitation of actions, and notice of action—Tender of amends—Payment of money into court—Parties to be made plaintiffs and defendants—Pleadings, defences, and evidence—Damages recoverable—Co-trespassers—Special damages—Mitigation of damages.

SECTION I.

OF ASSAULT AND BATTERY, AND MAYHEM.

What constitutes an assault.—Every laying of hands on the person of another, and every blow or push, constitutes an assault and trespass, in respect of which an action for damages is maintainable, unless the act can be justified or excused on the ground that it was done in self-defence, or the defence of one's property, or in obedience to some legal warrant or authority, or was the result of inevitable accident. Every attempt, also, or offer with force and violence to do hurt to another, constitutes an assault, such as striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike;

presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him, or shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the party is stopped before he gets near enough to carry the intention into effect (*s*); hitting at one man and unintentionally striking another (*t*); cutting off the hair of a pauper in a poor-house (*u*); throwing water upon the person of another (*x*); and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect (*y*). But as regards threatening gestures, if the parties at the time the gestures are used are so far distant from each other that immediate contact was impossible, there is no assault (*z*).

Words accompanying a threatening gesture may deprive that gesture of the character of an assault. Thus, where a man laid his hand on his sword in a threatening manner, but accompanied the gesture with the words, "If it were not assize-time I would not take such language from you," it was held that the words showed that the party did not *then* intend to use his sword, and that there was no assault (*a*). And Lord Abinger is reported to have held, that if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault (*b*).

The mere touching of a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not an assault, unless it is done in a hostile or insulting manner (*c*); nor is it an assault to push gently against the person of another in endeavouring to make a way through a crowd; but if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery (*d*).

An assault must be an act done against the will of the party assaulted, and therefore it cannot be said that a party has been assaulted by his own permission. If the act is done in the course of sport between parties taking liberties with each other by mutual consent, there is no assault (*e*).

Assaults resulting from acts of negligence.—An assault may be committed without any design or intention to commit an assault, for if the person of one man is violently struck through the carelessness and negli-

(*s*) Bac. Abr. ASSAULT, *Martin* v. *Shopper*, 3 C. & P. 373. *Stephens* v. *Myers*, 4 C. & P. 350. *Rex* v. *St. George*, 9 C. & P. 493.
(*t*) *James* v. *Campbell*, 5 C. & P. 372.
(*u*) *Forde* v. *Skinner*, 4 C. & P. 239.
(*x*) *Pursell* v. *Horne*, 3 N. & P. 564.
(*y*) *Read* v. *Coker*, 13 C. B. 860.
(*z*) Pollock, C. B., *Cobbett* v. *Grey*, 4 Exch. 744.
(*a*) *Turberville* v. *Savage*, 1 Mod. 3.
(*b*) *Blake* v. *Barnard*, 9 C. & P. 628.
(*c*) *Coward* v. *Baddeley*, 4 H. & N. 481; 28 Law J., Exch. 261.
(*d*) *Cole* v. *Turner*, 6 Mod. 149.
(*e*) *Christopherson* v. *Bare*, 11 Q. B. 477. *Reg.* v. *Martin*, 9 C. & P. 214.

gence of another, this is an assault, and it is no answer, as we have seen, to say that it was done unintentionally (ante, pp. 320, 321). Thus, if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he was seated, the party thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault (*f*).

Assaults by constables — Handcuffing unconvicted prisoners. — If a constable orders an unconvicted prisoner to be handcuffed when there is no attempt to escape, nor any reasonable ground to fear a rescue, the constable will be responsible in damages for an assault (*g*).

Assault and battery. — A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner (*h*). If a man is violently jostled out of the way or spat upon (*i*), or has water, stones, or dirt rudely thrown upon him (*k*), or has his hat insolently knocked off, or his hair forcibly cut (*l*), or his horse has been struck so that it ran away and threw him to the ground (*m*), the party guilty of the violence is liable to an action for an assault and battery. "But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery" (*n*). A touch given by a constable's staff in order to engage the attention of a party is not a battery (*o*).

Mayhem and wounding. — When the assault has been carried to the extent of maiming or crippling, or of wounding a person, it of course becomes of a much more serious character than a common assault, and the party injured will recover heavy damages, unless the maiming or wounding amounts to a felony, or can be justified or excused in the manner presently mentioned. The old word "mayme" or "mayhem," derived from the French word *mayhemer*, or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew, &c. (*p*).

Assault and battery in self-defence. — If the assault is in self-defence,

(*f*) *Hopper* v. *Reeve*, 7 Taunt. 698.
(*g*) Post, ch. 18, s. 2. *Griffin* v. *Coleman*, 28 Law J., Exch. 134; 4 H. & N. 265. *Wright* v. *Court*, 4 B. & C. 596.
(*h*) *Rawlings* v. *Till*, 3 M. & W. 28.
(*i*) *Reg.* v. *Cotesworth*, 6 Mod. 172.
(*k*) *Pursell* v. *Horn*, 8 Ad. & E. 604; 4 N. & P. 564.
(*l*) *Forde* v. *Skinner*, 4 C. & P. 239.
(*m*) *Dodwell* v. *Burford*, 1 Mod. 24; Sid. 433.
(*n*) Ld. Hardwicke, *Williams* v. *Jones*, Hard. 301.
(*o*) *Wiffin* v. *Kincard*, 2 N. R. 472. *Coward* v. *Baddeley*, ante, p. 482.
(*p*) Bac. Abr. MAIHEM. Beames's Glanv. p. 350. Bract. lib. 3, tr. 2.

and it can be shown that the plaintiff was the aggressor, and assaulted the defendant in the first instance, the action will be answered by a plea of *son assault demesne*, which is a plea alleging that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence. If one man strikes another, and the party struck, in the heat of anger, and on the impulse of the moment, returns the blow with a stick or bludgeon, the battery is excusable (*q*), but he has no right to revenge himself, and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and battery (*r*). If a man strike another who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case *son assault* is no good plea, and the second assault cannot be justified (*s*).

Assault in defence of the possession of a house, or close, or of property.— An assault and battery may be justified in defence of the possession of a house or a close, or a vestry-room, or pulpit (*t*), or in defence of the possession of goods and chattels by the person entitled to the possession and use of them. "If one man enters the house of another with force and violence, the owner of the house may justify turning him out, without a previous request to depart; but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out. If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter; and if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. A policeman may also, with the authority and at the request of the master of the house, himself proceed to turn out the intruder; but he is not bound to do so unless he pleases, as it is no part of a policeman's duty to do so (*u*). If a shopkeeper puts goods into his shop-window, ticketed at a certain price, he is not bound to sell them at the price marked; and if a customer insists upon having the goods, and refuses to leave the shop after having been requested so to do by the shopkeeper or his servants, he may be turned out (*x*). If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out, though the disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him, using no more violence than is necesssry to turn him out.

(*q*) *Oakes* v. *Wood*, 3 M. & W. 150.
(*r*) Coleridge, J., *Reg.* v. *Driscoll*, 1 Car. & M. 214.
(*s*) Holt, C. J., *Cockcroft* v. *Smith*, 11 Mod. 43.
(*t*) *Jackson* v. *Courtenay*, 8 Ell. & Bl. 8; 27 Law J., Q. B. 37; Bro. Abr. TRESPASS, pl. 128.
(*u*) *Wheeler* v. *Whiting*, 9 C. & P. 265.
(*x*) *Timothy* v. *Simpson*, 6 C. & P. 500.

If the person resists and lays hands on the landlord, that is an unjustifiable assault upon the landlord (*y*).

Assault in resistance of a forcible entry, or to prevent a seizure of chattels.—If one person enters another's house or ground with force and violence, the possessor or occupier of the house may oppose force by force, and turn the party out without a previous request to him to depart (*z*), unless the party making the forcible entry is a constable or officer acting under competent legal authority; for there is a manifest distinction between endeavouring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter (*a*). The same rule prevails with regard to a forcible seizure of goods and chattels, for wherever force is used to gain possession of a thing, "the force may be opposed by force without more ado" (*b*), although the party using the force has a right to the possession he seeks to acquire.

Resistance to a forcible entry by a landlord.—A forcible entry is expressly prohibited by the statute 5 Rich. 2, c. 7, even where entry is given by law. And it is laid down, that if a man enters peaceably into a house but turns the party out of possession by force, or by threats frightens him out of possession, this is a forcible entry (*c*). If a tenant who holds over after the expiration of his lease is *de facto* in possession of the house; if he is sitting in his drawing-room, or sleeping in his bed, and the landlord walks in at the front-door, the latter cannot be said to be in possession of the house any more than the visitor who comes to make a morning call; and if he lays hands on the tenant and turns him out, he cannot truly say that this was done in defence of his (the landlord's) possession of the house, such possession not having been gained until *after* the exercise of the act of force constituting the assault. But if the tenant, or any other party who has originally lawfully come into possession, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter, and take and keep possession. The previous possessor is then lawfully dispossessed, and if he re-enters he commits a trespass, and may be turned out of the house or off the land (*d*).

Assaults in preservation of the public peace.—Any person who witnesses an affray may, during the continuance of the affray, and for the purpose of putting a stop to it, lay hands on the affrayers (*e*). If he comes up in the midst of the affray, and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence, he is not

(*y*) *Howell* v. *Jackson*, 6 C. & P. 725. *Webster* v. *Watts*, 11 Q. B. 311; 17 Law J., Q. B. 73.

(*z*) *Tullay* v. *Reed*, 1 C. & P. 6.

(*a*) *Polkinghorn* v. *Wright*, 8 Q. B. 206.

(*b*) *Green* v. *Goddard*, 2 Salk. 641; Owen, 150.

(*c*) Bosanquet, J., *Newton* v. *Harland*, 1 Sc. N. R. 474; 1 M. & Gr. 660; Bac. Abr. FORCIBLE ENTRY.

(*d*) *Browne* v. *Dawson*, 12 Ad. & E. 629. *Taylor* v. *Cole*, 3 T. R. 295. *Taunton* v. *Costar*, 7 T. R. 431. *Butcher* v. *Butcher*, 7 B. & C. 402.

(*e*) *Noden* v. *Shores*, 16 Q. B. 218.

guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose (*f*).

Battery and wounding in self-defence, or in defence of the possession of tenements or chattels.—When a person has been assaulted in such a way as to endanger his life, he is of course justified in maiming and wounding the attacking party; and if he has been violently assaulted, or assaulted in such a way as to put him into bodily fear, the mayhem or wounding, if inflicted in self-defence, is held excusable. "A man cannot justify a maim for every assault, as, if A strike B, B cannot justify the drawing his sword and cutting off his hand" (*g*). "If A strike B, and B strike again, and they close immediately, and in the scuffle B maihems A, this maihem is excusable; but if, upon a little blow given by A to B, B gives him a blow that maihems him, this maihem is not excusable."

"Cockcroft, an attorney, in a scuffle ran his finger towards the defendant's eye, who bit a joint off the finger: the question was, whether this was a proper defence for the defendant to justify in an action of mayhem; and Holt, C. J., said that a man ought not, in the case of a small assault, to give a violent or unsuitable return, but in such a case plead what is necessary for a man's defence, and not who struck first, for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword, and cut and hew the other" (*h*). To justify a battery, the defendant must show that there was an unlawful resistance on the part of the plaintiff to the lawful acts of the defendant. If the plaintiff complains of repeated blows, of his having been knocked down and wounded, or of his having had his leg broken, it is no answer to say that the plaintiff intruded himself into the defendant's dwelling-house, and made a disturbance, and would not go out, and therefore the defendant knocked him down, or cut his head open with a truncheon, or broke his leg, as no man is justified in resorting to such severe measures to expel an intruder, unless RESISTANCE has been offered; in which case the plea of justification must allege the fact of the resistance, and it must be shown that the force used was no more than was reasonably necessary to overcome such resistance (*i*).

In an action of trespass it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground, and the defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden, and went up the ladder in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, and gently overturned it, and gently threw the

(*f*) *Timothy* v. *Simpson*, 6 C. & P. 500.

(*g*) Per Cur. *Cook* v. *Beale*, Ld. Raym. 177; 3 Salk. 115.

(*h*) *Cockcroft* v. *Smith*, 11 Mod. 43; 2 Salk. 641.

(*i*) *Gregory* v. *Hill*, 8 T. R. 299. *Oakes* v. *Wood*, 2 M. & W. 791.

plaintiff from it upon the ground, doing as little damage as possible to the plaintiff, and on demurrer to the plea it was held that the overturning and throwing down of the ladder, however gently, with the plaintiff upon it, was unjustifiable, and the plea bad (*k*).

SECTION II.

OF FALSE IMPRISONMENT.

Constructive imprisonment—False imprisonment is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison, or a private house, or in the stocks, or by forcibly detaining one in the public streets. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time. Actual contact is not necessary to constitute an imprisonment. Any restraint put upon the freedom of another by show of authority or force, is sufficient to constitute an imprisonment; so that, if a person is restrained from leaving a room, or going out of a house, without the presence of a constable, this infringement of his personal liberty will constitute an imprisonment (*l*). If a bailiff who has a process against any one says to him, 'You are my prisoner, I have a writ against you,' upon which the party addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process (*m*). If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used; for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actual hold of him; and it is that entire restraint upon the will which constitutes the imprisonment (*n*). "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have

(*k*) *Collins* v. *Renison*, Say. 138.

(*l*) *Warner* v. *Riddiford*, 4 C. B., N. S. 206.

(*m*) *Grainger* v. *Hill*, 4 Bing. N. C. 212.

(*n*) Williams, J., *Bird* v. *Jones*, 7 Q. B. 743; 2 Inst. 589; Bull, N. P. 62.

the right and the power to compel him, that is an arrest" (*o*). But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an-hour, it was held that this was no imprisonment (*p*).

Imprisonment by order of a judge or judicial officer.—All judges of a court of record have power to commit to the custody of their officer *sedente curiâ*, by oral command, without any warrant made at the time. This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary. A prisoner is in lawful custody although committed to prison for the purpose of being brought up again for rehearing, without any warrant or commitment in writing (*q*).

Arrest in execution of warrants of justices.—Officers making an arrest in execution of a warrant of justices ought to have their warrant with them, ready to be produced in case it should be required. Not having it, they are not justified in making arrest, unless the arrest be made for felony, or suspicion of felony (*r*).

Arrest by constables without warrant.—A constable has no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanour (*s*); but if he has reasonable cause to suspect that a person has committed a felony, he may detain such person, not being an infant under the age of seven years, incapable of committing a felony (*t*), until he can be brought before a justice of the peace to have his conduct investigated (*u*). There is no standard or fixed rule as to what is reasonable ground of suspicion which can be laid down as applicable to all cases. "The charge," observes Watson, B., "may be reasonable or unreasonable with reference to the circumstances and the character of the party making it. And while on the one hand a constable ought to be protected in the execution of his duties, he ought on the other to be guided in the discharge of those duties by ordinary reason, care, and caution."

(*o*) Tindal, C. J., *Wood* v. *Lane*, 6 C. & P. 774.

(*p*) *Bird* v. *Jones*, 7 Q. B. 742.

(*q*) *Kemp* v. *Neville*, 31 Law J., C. P. 165. *Throgmorton* v. *Allen*, 14 M. & W. 70.

(*r*) *Galliard* v. *Laxon*, 31 Law J., M. C. 123.

(*s*) *Bowditch* v. *Balchin*, 5 Exch. 380. *Griffin* v. *Coleman*, 28 Law J., Exch. 134; 4 H. & N. 265.

(*t*) *Marsh* v. *Lowder*, 2 N. R., C. P. 280.

(*u*) *Beckwith* v. *Philby*, 6 B. & C. 635; 9 D. & R. 487. *Lawrence* v. *Hedger*, 3 Taunt. 14. *Buckley* v. *Gross*, 32 Law J., Q. B. 129.

Where, therefore, a travelling showman, told the defendant, a police-constable, at a fair, that he had had some harness stolen a year before, and that the stolen harness was on the plaintiff's horse, and directed the constable to take the plaintiff into custody, and the constable went to the plaintiff, and asked him where he got the harness, and the plaintiff gave the common thief's answer—that he had bought the harness of a man he did not know, and had given him a shilling for it, whereupon the constable took the plaintiff into custody, but it appeared that the constable had known the plaintiff for twenty years as a respectable householder; it was held that there was no reasonable cause for the arrest, and that the constable was responsible in damages for a wrongful imprisonment (*v*). But if one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment, because it turns out that the charge is false, and that no felony had in fact been committed (*x*); for if one man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, "it would be most mischievous," observes Lord Mansfield, "that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge alone is answerable. The officer does his duty in carrying the accused before a magistrate, who is authorised to examine and commit or discharge" (*y*). If an arrest by a constable is in its inception wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in strict discharge of their official duty (*z*). Every unlawful detainer of a prisoner after he has gained a right to be discharged is a fresh imprisonment (*a*).

Arrest by private persons without warrant.—"If treason or felony be done," observes Lord Coke, "and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus* (*b*). There is this distinction between an arrest for felony by a private individual and a constable. In order to justify the private individual in causing the imprisonment, he must not only make out a reasonable

(*v*) *Hogg* v. *Ward*, 3 H. & N. 417; 27 Law J., Exch. 443.

(*x*) Hale, P. C., 177, *Davis* v. *Russell*, 2 M. & P. 607; 5 Bing. 354.

(*y*) *Samuel* v. *Payne*, 1 Doug. 360.

(*z*) *Griffin* v. *Coleman*, 4 H. & N. 265; 28 Law J., Exch. 134. *Wright* v. *Court*, 4 B. & C. 596.

(*a*) *Withers* v. *Henley*, Cro. Jac. 379.

(*b*) *Davis* v. *Russell*, 5 Bing. 357; 2 M. & P. 590; 2 Inst. 52.

ground of suspicion, but he must prove that a felony has actually been committed by some person or another, and that the circumstances were such that any reasonable person acting without passion or prejudice would have fairly suspected that the plaintiff committed it, or was implicated in it (*c*), whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until he can be brought before a justice of the peace to have his conduct investigated (*d*).

Arrest for a misdemeanour.—Regularly no private person can of his own authority, without warrant, arrest another for a misdemeanour, except for a breach of the peace, whilst the strife is going on, and to prevent its continuance. But it is said in Hawkins' "Pleas of the Crown," "that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping" (*e*). "These cases in Hawkins," observes Lord Tenterden, "are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Where the case is only one of suspicion, the arrest is unjustifiable. The instances in Hale of arrest on suspicion, after the act has been done, relate to felony. In cases of misdemeanour, the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands" (*f*).

Arrest of the wrong party.—If the party complaining of a wrongful arrest has brought the injury upon himself by his own misstatements and misrepresentations, he has no ground for maintaining an action for damages. If there was lawful ground for arresting A, and B represents himself to be A, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth (*g*).

Arrest for malicious injuries to property.—The statutes for consolidating

(*c*) Tindal, C. J., *Allen* v. *Wright*, 8 C. & P. 526. *Hall* v. *Booth*, 3 N. & M. 316.

(*d*) Ld. Tenterden, *Beckwith* v. *Philby*, 6 B. & C. 638; ante, p. 489.

(*e*) Hawkins, P. C. 2, c. 12, s. 20.

(*f*) *Fox* v. *Gaunt*, 3 B. & Ad. 800.

(*g*) *Dunston* v. *Paterson*, 2 C. B., N. S. 495; 26 Law J., C. P. 267.

the laws relative to malicious injuries to property, enact that any person found committing any offence under that act may be immediately apprehended without a warrant by any peace-officer, or the owner of the property injured, or his servant or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law (*h*). To justify an arrest under this statute, it must be shown that the offence prohibited and made punishable was actually committed (*i*), that the plaintiff was found and taken in the act (*k*), and that the party arresting was either the occupier or the landlord of the property injured. It must also be shown that the trespass was a wilful and malicious trespass.

Wilful and malicious trespass.—A trespass can only be wilful and malicious where it is committed by a party who knows that he has no claim or pretence of right to enter the land. If he had reasonable ground for supposing that he had a right, his conduct can neither be called wilful nor malicious (*l*).

Arrest of parties committing indictable offences in the night.—It is lawful for any private individual to apprehend any one who shall be "found committing" any indictable offence in the night, *i. e.* between 9 P.M. and 6 A.M., and to convey him or deliver him to some constable or other peace-officer, to be conveyed before a justice of the peace, to be dealt with according to law (*m*).

Arrest for an assault and breach of the peace.—A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. "If A be dangerously hurt, and the common voice is that B hurt him, or if C thereupon come to the constable and tell him that B hurt him, the constable may imprison B till he knows whether A lives or dies, and until he can bring him before a justice. But if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without warrant" (*n*). If an assault be committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression "recently," not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate (*o*). If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow (*p*), nor in handcuffing him.

(*h*) 24 & 25 Vict. c. 97, s, 61; 7 & 8 Geo. 4, c. 30.
(*i*) *Parrington* v. *Moore*, 2 Exch. 225.
(*k*) *Simmons* v. *Millingen*, 2 C. B. 530.
(*l*) *Looker* v. *Halcomb*, 12 Moore, 416; 4 Bing. 183.
(*m*) 14 & 15 Vict. cap. 19, s, 11.
(*n*) 1 Hale, P. C. 587.
(*o*) *Reg.* v. *Light*, 27 Law J., M. C. 1.
(*p*) *Levy* v. *Edwards*, 1 C. & P. 40.

Various statutes provide for the punishment of all persons who shall assault peace-officers or revenue-officers (*q*), metropolitan police-officers (*r*), special constables and district constables (*s*), in the execution of their duty, or aid or incite others so to do.

Arrest during the continuance of an affray.—For the preservation of the peace, any individual who sees it broken may restrain the liberty of him he sees breaking it, so long as the conduct of such party shows that the public peace is likely to be endangered by his acts. Any bystander may, and ought to, arrest an affrayer at the moment of the affray, and detain him until his passion be cooled, and then deliver him to a peace-officer, to be carried before a justice of the peace, to be compelled to find sureties for keeping the peace; but a private individual who has witnessed an affray cannot after the affray has ceased lawfully give the affrayers, or one or some of them, into custody, unless the affrayers continue on the spot, and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray (*t*). If the affrayers, on hearing or seeing that the police-constables are coming, run away and disperse, they cannot lawfully be pursued and taken by constables, or given in custody by private individuals, for the affray that is then ended (*u*). If during an affray a bystander calls up a policeman, and directs him to take one of the affrayers into custody, the bystander does not thereby render himself amenable to an action for false imprisonment (*x*).

The continued ringing at a door-bell without cause or excuse does not in itself amount to a breach of the peace, so as to justify the arrest of a party by a private individual; but it is eminently calculated to lead to a breach of the peace, and if it is done and persisted in within view of a constable, the latter may take the aggressor into custody (*y*). And if the nuisance be committed within the metropolitan police district, the offender may, if found in the act, be apprehended by the master of the house (*z*). If a man threatens to force his way into the house of another, and collects a mob at the door, and refuses to go away when directed so to do, the owner of the house is justified in directing a constable to take him into custody, in order to preserve the peace (*a*).

What amounts to a breach of the peace.—It must be shown that there was an actual breach of the peace in order to justify an imprisonment. It is not enough to show that the plaintiff "made a great noise and disturbance, and refused to depart, and was in great heat and fury, ready

(*q*) 9 Geo. 4, c. 31, s. 25.
(*r*) 2 & 3 Vict. c. 47, s. 18.
(*s*) 1 & 2 Wm. 4, c. 41, s. 11; 2 & 3 Vict. c. 93, s. 8.
(*t*) *Timothy* v. *Simpson*, 1 C. M. & R. 757. *Price* v. *Seeley*, 10 Cl. & Fin. 39.
(*u*) *Baynes* v. *Brewster*, 2 Q. B. 385.
(*x*) *Derecourt* v. *Corbishley*, 1 Jur. N. S. 870, Q. B.
(*y*) *Grant* v. *Moser*, 5 M. & Gr. 123; 6 Sc. N. R. 46.
(*z*) Post, p. 493. *Simmons* v. *Millingen*, 2 C. B. 524.
(*a*) *Ingle* v. *Bell*, 1 M. & W. 516.

and desirous to make an affray and commit a breach of the peace" (*b*). Disturbance and annoyance of a public meeting, by putting questions to the speakers, making observations on their statements, and saying, "That's a lie," do not constitute a breach of the peace (*c*). But if a man comes into a public-house, and makes a very great noise and disturbance therein, and creates alarm and disquiets the neighbourhood, his conduct amounts to a breach of the peace, and justifies the landlord in giving him into custody, if the disturbance occurs within view of a constable (*d*). If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace (*e*).

Arrest of persons disturbing divine service.—Any person who is guilty of riotous, violent, or indecent behaviour in any church or chapel, or duly certified place of religious worship, or in any churchyard or burial-ground, or who molests, disturbs, vexes, or troubles any preacher duly authorised to preach therein, or any clergyman celebrating divine service, &c., may immediately, on the commission of the misdemeanour, be apprehended by any constable or churchwarden of the place and taken before a magistrate. To bring the offender within this statute it must be shown that the disturbance was wilful and intentional (*f*).

Arrest of vagrants and persons found committing acts of public indecency.—The Vagrant Act, 5 Geo. 4, c. 83, authorises any person whatsoever to apprehend any one found committing any of the acts of vagrancy specified in s. 4 of the statute, such as fortune-telling, indecent exposure of the person in any street, road, or place of public resort, or within view thereof, with intent to insult any female; gathering of alms by exposure of wounds and deformities; collection of alms by false pretences; playing or betting in streets or public places with instruments of gaming, &c.

Arrest under the Merchant Shipping Act.—By 25 & 26 Vict. c. 63, s. 37, power is given to the master or other officer of any duly surveyed passenger steamer and his assistants to detain persons whose name and address are unknown, and who have committed any of the offences specified in the act, such as being drunk and disorderly, and refusing to leave a steamer after request, and return or tender of the fare paid; molesting passengers after warning by an officer not to do so; persisting in entering or refusing to leave a steamer having its full complement of passengers; travelling, or attempting to travel, without previous payment of the fare,

(*b*) *Wheeler* v. *Whiting*, 9 C. & P. 262.
(*c*) *Wooding* v. *Oxley*, 9 C. & P. 1.
(*d*) *Howell* v. *Jackson*, 6 C. & P. 723. *Webster* v. *Watts*, 11 Q. B. 311; 17 Law J., Q. B. 73.
(*e*) *Cohen* v. *Huskisson*, 2 M. & W. 482.
(*f*) 23 & 24 Vict. c. 32. ss. 2, 3. *Williams* v. *Glenister*, 2 B. & C. 699.

with intent to avoid payment; proceeding beyond the distance for which the fare is paid, with intent to avoid payment for the additional distance; refusing to leave the steamer on arriving at the point to which the fare is paid; refusing either to pay the fare, or to exhibit the ticket or receipt for the fare, when demanded; wilfully obstructing any of the crew in the execution of their duty upon or about the steamer, &c.

Arrest of a principal by his bail.—The bail may, whenever they please, render their principal in their own discharge. They may take him up even upon a Sunday, and confine him until the next day, and then render him; and the doing it on a Sunday is no service of process, but rather like the case where a sheriff arrests by virtue of a process of court on Saturday, and the party escapes, and the sheriff takes him upon a Sunday, which he may do, for it is only a continuance of the former imprisonment (*g*). A witness who has given bail is always supposed to be in the custody of his bail, and may be taken and rendered at any time, even while he is attending as a witness in a court of justice in obedience to his subpœna (*h*).

Arrest for offences committed within the limits of the metropolitan police district.—The statute 2 & 3 Vict. c. 47, s. 54, enables any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within his view (*i*), shall commit any of the various offences therein specified and forbidden within the limits of the metropolitan police district. Among these offences may be enumerated the exposing to the annoyance of the inhabitants or passengers of horses for show or sale; the exhibition of caravans, shows, or public entertainments; suffering ferocious dogs to go at large unmuzzled, or urging one dog to attack another; negligent driving of cattle or animals; riding on the shafts of carriages without holding the reins; furious driving; wilfully obstructing public crossings and public thoroughfares; riding animals or driving carriages, trucks, or barrows upon, or fastening horses across, footways; rolling any cask, tub, hoop, wheel, &c., upon footways, except for the purpose of crossing them, or loading or unloading carriages; disregarding the police regulations for preventing obstructions in public thoroughfares; posting bills or papers upon walls and buildings without consent of the owner or occupier; using threatening, abusive, or insulting words or behaviour, whereby a breach of the peace may be occasioned; blowing of horns, or any other noisy instrument, for the purpose of calling persons together, or announcing any show or entertainment, or for the purpose of selling articles, or obtaining money or alms; wantonly discharging fire-arms, stones, or other missiles, to the danger of any person;

(*g*) Per. Cur. *Anon.* 6 Mod. 231.
(*h*) *Lyne, ex parte*, 3 Stark. 132. *Horn* v. *Swinford*, Dowl. N. P. C. 20.
(*i*) *Justice* v. *Gosling*, 21 Law J., C. P. 94.

making bonfires, or throwing or setting fire to any firework; wilfully and wantonly disturbing any inhabitant, by pulling or ringing any door-bell, or knocking at any door without lawful excuse, or wilfully and unlawfully extinguishing the light of any lamp; flying a kite, or playing at any game, to the annoyance of the inhabitants and passengers, or making a slide upon the ice or snow in any thoroughfare.

Metropolitan police-constables, and all persons whom they shall call to their assistance, are furthered empowered (s. 63) to arrest, without warrant, any person who, within view of any such constable, shall offend in any manner against that act, and whose name and residence shall be unknown to, and cannot be ascertained by, such constable; also, all disorderly persons disturbing the public peace, whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanour, or breach of the peace; also, persons charged with aggravated assaults, where he has good reason to believe that the assault has been committed, though not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender; also, all persons found committing any offence punishable, either upon indictment, or as a misdemeanour upon summary conviction, by virtue of the statute.

Any person, also, found committing an offence punishable, upon indictment, or as a misdemeanour upon summary conviction, by virtue of the Metropolitan Police Act may be apprehended by the owner of the property, on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law (*k*). In order to justify a private individual in arresting and detaining an offender within this section, the latter must be actually "found committing" the offence, and must be taken *flagrante delicto:* it is not enough to show that he had committed the offence, however recently. If the offence be, that the party has knocked and rung at a dwelling-house, to the disturbance of the inmates, and the offender has ceased to knock and ring, and has walked away, whether a yard or a quarter of a mile it matters not, he is not within the words or the policy of the section, which only applies where the offender is arrested in the course of committing the offence, and it is necessary to apprehend him in order to prevent a continuance of the nuisance (*l*).

Arrest by servants of railway companies.—Many acts of parliament, under which railway companies are incorporated, authorise any officer or agent of the company to seize and detain any person whose name and residence shall be unknown, who shall commit any offence against the act,

(*k*) 2 & 3 Vict. c. 47, ss. 63, 66. (*l*) *Simmons* v. *Millingen*, 2 C. B. 533.

and to convey him with all convenient dispatch before some justice, &c., without any other warrant or authority than that given by the act. These statutes do not authorise railway companies, their officers or agents, to take a person into custody, or to detain him, for riding in a first-class carriage with a second-class ticket, or for riding in a carriage without a ticket, or for refusing to pay his fare when it is demanded, or for mere acts of omission or offences against by-laws (*m*). By 8 Vict. c. 20, ss. 103, 104, a penalty is imposed upon any person travelling on a railway without having paid his fare, with intent to avoid payment thereof, and power is given to all officers and servants, on behalf of the company, to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offence; and if by mistake an innocent person is apprehended by order of a superintendent, the company will be answerable for the wrong done (*n*). Pulling down boards set up by the company, and other injuries to their property, seem to be offences for which parties found in the commission of them are liable to be at once taken into custody, and carried before a magistrate.

Detention of recruits and deserters.—The Articles of War do not justify the arrest and detention by an officer of any but a recruit or a soldier. The annual Mutiny Act generally enacts, that every person who shall knowingly receive enlistment-money from certain persons employed in the recruiting-service "shall be deemed to be enlisted as a soldier in Her Majesty's service" (*o*). If a party apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered or procured his imprisonment, will be responsible in damages for the wrong done, for none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces.

Imprisonment of dangerous lunatics.—A private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person (*p*), the restraint being necessary both for the safety of the lunatic and the preservation of the public peace; but as the custody of these unfortunate persons is matter of great public interest, the legislature has, by a series

(*m*) *Chilton* v. *Lond. & Croyd. Rail. Co.*, 16 M. & W. 231. *Tollemache* v. *Lond. & S. W.*, 26 Law T. R. 222. *Goff* v. *Gt. North. Rail. Co.*, 30 Law J., Q. B. 148.

(*n*) *Goff* v. *Gt. North. Rail. Co.*, ut sup.

(*o*) *Wolton* v. *Gavin*, 16 Q. B. 48.

(*p*) Bro. Faux Imprisonment, pl. 28; pl. 25, Bac. Abr.

of enactments, established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition, and imposing the necessary restraint upon their actions, under the supervision of public functionaries.

The statutes 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96, establish a strict and careful form of proceeding, based upon medical certificates, for the purpose of facilitating the reception of persons of unsound mind, who are dangerous to themselves or to others, in asylums where they are to be properly restrained and treated. If the forms of proceeding prescribed by this act are not strictly complied with, the imprisonment is unlawful (*q*). The fact of a person's acting so as to appear to be of unsound mind is no justification to another for locking him up as a lunatic, without compliance with the requisite form of proceeding. It must be proved that the party imprisoned was, at the time the restraint was put upon him, a dangerous lunatic. The statutes now in force as to the certificates required to be made by the friend of a supposed lunatic and the medical men, protect every person acting in pursuance of the act, except the person signing the order for the confinement of the lunatic. The certificates of all the doctors and physicians in the world will not justify one person in taking and confining another as a lunatic, unless it be proved that the party confined was really a dangerous madman, or unless the party justifying the imprisonment is the medical man, or the keeper of the asylum, or his servant, entitled to statutory protection (*r*).

SECTION III.

OF ACTIONS FOR AN ASSAULT AND BATTERY, AND FOR FALSE IMPRISONMENT.

Statutory protection to constables and their assistants from vexatious actions.—By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 5, it is enacted, that if any action upon the case, trespass, battery, or false imprisonment, shall be brought against constables, their deputies or assistants, for or concerning any matter by them done by virtue of their offices, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere; and that it shall be lawful for such constables, &c., to plead the general issue, not guilty, and to give any special

(*q*) Coleridge, J., *Reg.* v. *Pinder*, 24 Law J., Q. B. 148. *Reg.* v. *Munster*, 20 ib. M. C. 48. *Norris* v. *Seed*, 3 Exch. 782.

(*r*) *Fletcher* v. *Fletcher*, 28 Law J., Q. B. 134.

matter discharging them from liability in evidence to the jury; and that if upon the trial of any such action the plaintiff shall not prove to the jury that the trespass, battery, imprisonment, or other fact or cause of action, was committed or done within the county wherein the action shall be laid, the jury shall find the defendant not guilty, without regard to any evidence on the merits.

By the statute 1 & 2 Wm. 4, c. 41, providing for the appointment of special constables, it is enacted, s. 19, for the protection of persons acting in execution of the act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of the act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give the act and the special matter in evidence at the trial; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money shall have been paid into court after action by or on behalf of the defendant.

The Municipal Corporations Act (5 & 6 Wm. 4, c. 76), regulating the appointment of constables for boroughs, further provides (s. 76), that the men sworn as such constables shall not only within the borough, but also within the county in which the borough or any part thereof is situate, and in any county within seven miles of the borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed then had, or thereafter might have, within his constablewick by virtue of the common law, or of any statutes made or to be made; and s. 113 contains the usual clause for the protection of persons acting in execution of the act, making all actions against such persons triable only in the county where the act was done, limiting them to six months from the accrual of the cause of action, making one calendar month's notice of action essential, and enabling the defendant to plead the general issue, and give special matter of justification or excuse in evidence at the trial, and prohibiting the plaintiff from recovering after tender of sufficient amends before action, or payment of a sufficient sum into court after action.

By 2 & 3 Vict. c. 91, for regulating the police courts of the metropolis, it is enacted (s. 55), that no action, suit, information, or other proceeding, shall be brought against any person for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers thereof, unless twenty days' previous notice in writing shall be given, nor unless the action shall be commenced within three calendar months next

after the act committed, or, in case of continuing damage, within three calendar months next after such damage has ceased, nor unless the action, &c., shall be brought in the county of Middlesex.

And by 2 & 3 Vict. c. 93, for the establishment of county and district constables, it is provided (s. 8) that the chief constable, and other constables appointed under that act, shall have all the powers, privileges, and duties throughout the county, and in all liberties, franchises, and detached parts of counties locally situate within the county, and also in any adjoining county, which any constable has within his constablewick, by virtue of the common law, or any statute made or to be made (*s*), and every protective provision of the stat. 1 & 2 Wm. 4, c. 41 (ante, p. 498), is to be deemed to extend to the constables appointed under that act. This statute is amended by 2 & 3 Vict. c. 93, which provides for the consolidation of county and borough police establishments, and of their mutual powers, privileges, and duties throughout counties and boroughs; and the stat. 19 & 20 Vict. c. 69, for rendering more effectual the police in counties and boroughs, makes (s. 15) further provision for the consolidation of county and borough police, their powers, privileges, duties, and responsibilities; and by 20 Vict. c. 2, s. 4, the statutes 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69, are to be construed together as one act.

Protective clauses in favour of parties acting in the execution of acts of parliament.—Most acts of parliament conferring special powers and authorities upon constables and others for the accomplishment of particular purposes, contain the usual protective clauses for the benefit of persons acting in the execution of the act; making the cause of action local, and requiring the action to be commenced within a certain limited period, and notice of action to be given; and enabling the defendant to plead the general issue, and give the special circumstances of justification in evidence; and prohibiting the plaintiff from recovering after tender of amends. This is the case with the annual Mutiny Act, the Larceny Act (*t*), the Malicious Trespass Act (ante, p. 491), the Metropolitan Police Act (ante, p. 494), the Game Acts, the Statute for the Prevention of Cruelty to Animals (*u*), the Revenue, Excise, and Customs Acts, the Public Health Act, and various statutes, enabling constables and private individuals to arrest persons found in the commission of a felonious or prohibited act.

Limitation of actions, and notice of action.—Protective clauses in acts of parliament in favour of constables and officers acting in the execution of their offices, or in favour of constables or of private individuals acting in the execution or in pursuance of particular acts of parliament, are

(*s*) *Mellor* v. *Leather*, 1 Ell. & Bl. 623. *Scott*, 2 Sc. N. R. 631.
(*t*) 7 & 8 Geo. 4, c. 29, s. 75. *Rudd* v. (*u*) *Hopkins* v. *Crowe*, 4 Ad. & E. 774.

intended for the benefit of those who want to act rightly, but have by mistake done wrong. It has been frequently observed by the courts, that the notice which is directed to be given to constables and officers before actions brought against them is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it (*x*). "The object," observes Lord Ellenborough, "clearly is to protect persons acting illegally, but in supposed pursuance, and with a *bonâ-fide* intention, of discharging their duty under the act of parliament. Where the law is not exceeded the protection is not required" (*y*). "It is not wanted," observes Jervis, C. J., "by those who are in the right, and have a perfect justification under the act of parliament, but by those who are in the wrong, in order that they may have an opportunity of tendering amends. If the defendant *bonâ fide* believed that he was acting in pursuance of the statute, and in the exercise of a legal right, that is all that is necessary to entitle him to notice of action. It is not necessary that he should know the act, chapter, and verse." "Whether he had reasonable grounds for believing," further observes Maule, J., "that he was acting in pursuance of the statute, may be very fit to be considered when the question is as to his *bona fides*, for a case may be supposed where there is such a want of reasonable ground for belief as to negative his *bona fides* (*z*). In order to establish a claim to the statutory protection, it must appear that the act done was of that nature and description that the party doing it might reasonably suppose that the act of parliament gave him authority to do it (*a*). Where there is no reasonable ground for supposing that the act done is authorised, the party is not protected by the statute, and notice of action is not requisite (*b*).

Where the owner of property, injured by the act of another, *bonâ fide* supposes that he has a right to give the person injuring his property into custody, and there is a fair colour for the proceeding, he is entitled to notice of action, though he was altogether mistaken in the assertion of his rights, and cannot justify the trespass under the statute (*c*). The protection afforded by the statute is not strictly confined to the owner of the property injured, but is extended to all persons who had a *bonâ-fide* belief, founded on fair and reasonable grounds, that they filled the

(*x*) Per Lord Kenyon, C. J., *Greenway* v. *Hurd*, 4 T. R. 555.

(*y*) *Theobald* v. *Crichmore*, 1 B. & Ald. 229.

(*z*) *Read* v. *Coker*, 22 Law J., C. P. 205; 13 C. B. 861. *Booth* v. *Clive*, 10 ib. 827; L. M. & P. 283. *Jones* v. *Howell*, 29 Law J., Exch. 19. *Horn* v. *Thornborough*, 3 Exch. 850. *Smith* v. *Hopper*, 9 Q. B. 1014. *Cox* v. *Reid*, 13 Q. B. 558. *Hughes* v. *Buckland*, 15 M. & W. 353. *Kine* v. *Evershed*, 10 Q. B. 150.

(*a*) *Rudd* v. *Scott*, 2 Sc. N. R. 633.

(*b*) *Cook* v. *Leonard*, 6 B. & C. 356. *Hermann* v. *Seneschall*, 13 C. B., N. S. 392; 32 Law J., C. P. 43.

(*c*) *Beachy* v. *Sides*, 9 B. & C. 809. *Norwood* v. *Pitt*, 29 Law J., Exch. 127.

character mentioned in the statute, and acted under that belief (*d*). If the plaintiff was found in the act of committing a malicious trespass, and the defendant had reasonable ground for believing that he had authority from the owner of the property to interfere, and take or give the plaintiff into custody, the defendant will be entitled to notice of action (*e*). But as the statute only authorises the arrest of persons "found committing an offence within the statute," the defendant must, if the plaintiff was not taken *flagrante delicto*, show that a malicious trespass had been committed; that the plaintiff was on the spot; that there was reasonable ground for believing that the mischief was still going on, and that the plaintiff was the author or instigator of it (*f*). "Several decisions have established that *bona fides* is not alone sufficient to bring a case within the privileges of these acts of parliament" (*g*). If there is no pretence or colour for the notion that the injurious act was done in execution of the statute under which the defendant shelters himself, he could have had no fair and reasonable ground for supposing that he was privileged and protected, and cannot, consequently, claim protection (*h*).

"It would be wild work," observes Williams, J., "if a party might give himself protection by merely saying that he believed himself to be acting in pursuance of a statute. Still, protecting clauses of this sort would be useless if it were necessary that the person claiming the benefit of them should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute" (*i*).

When the privilege is accorded to a person who fills a particular character and situation, the defendant, who claims the privilege on the ground that he acted in good faith on the belief that he was clothed with the official character, must show some reasonable ground for his belief. A general persuasion that the defendant had the power he claimed to exercise will not entitle him to the privilege, but a mistaken opinion on any of the facts which must exist to give him the power will not deprive him of his right to the protection of the statute (*k*). If, as a reasonably reflecting and careful person, he must have known that he was not clothed with the requisite official character, he has no ground for claiming the protection of notice of action (*l*).

Notice of action to persons acting in execution of the Metropolitan Police Act.—The 79th section of the Metropolitan Police Act (2 & 3 Vict.

(*d*) *Hughes* v. *Buckland*, 15 M. & W. 346. *Horn* v. *Thornborough*, 3 Exch. 849.

(*e*) *Kine* v. *Evershed*, 10 Q. B. 150.

(*f*) *Cann* v. *Clipperton*, 10 Ad. & E. 588. *Ballinger* v. *Ferris*, 1 M. & W. 631.

(*g*) Ld. Denman, C. J., *Smith* v. *Hopper*, 9 Q. B. 1014. *Cook* v. *Leonard*, 6 B. & C. 351. *Home* v. *Grimble*, Car. & M. 23.

(*h*) *Shatwell* v. *Hall*, 10 M. & W. 525. *Eliot* v. *Allen*, 1 C. B. 37.

(*i*) *Cann* v. *Clipperton*, 10 Ad. & E. 589. *Hopkins* v. *Crowe*, 4 Ad. & E. 777.

(*k*) *Kine* v. *Evershed*, 10 Q. B. 150.

(*l*) *Lidster* v. *Borrow*, 9 Ad. & E. 654. *Booth* v. *Clive*, 10 C. B. 835.

c. 47) enacts, that that act is to be construed as one act with the 10 Geo. 4, c. 44, the 41st section of which provides that notice of action must be given to all persons acting in the execution of that act. If, therefore, a party has reasonable grounds for believing that he is entitled to arrest a person found committing an act prohibited by the Metropolitan Police Act, he is entitled to notice of action (*m*).

Parties entitled to the benefit of the protection.—A person who acts as a prime mover and principal in setting a constable in motion who commands, the constable, instead of being commanded by the latter, is not acting in aid of such constable, and is not entitled to the benefit of the statute (*n*); but he who acts only when required by the constable to assist him, is within the protecting clauses of the statutes.

Length of notice of action.—By 5 & 6 Vict. c. 97, s. 4, it is enacted, that in all cases where notice of action is required to be given, such notice shall be given one calendar month at least before any action shall be commenced, and such notice shall be sufficient, any act to the contrary thereof notwithstanding. In the computation of the calendar month, the day of giving the notice and the day of suing out the writ are both to be excluded, for otherwise the intervening period is not a whole month as required by the statute (*o*).

Statement of the cause of action.—A notice of action against a constable or officer should set forth the substantial ground of complaint against him, and should specify the time and place of the commission of the grievance (*p*). If the notice contains a reference to a wrong statute, the wrong reference may be rejected, as a reference to the statute requiring notice to be given is not an essential part of the notice (*q*); but the court in which the action is brought, if stated at all, should be correctly stated, particularly if several notices of action have been served (*r*). It is not necessary in the notice to name all the persons meant to be made parties to the action, nor to express whether it is intended to be brought against several persons jointly, or against one person only (*s*), but every plaintiff who sues must give notice of action, and every defendant must receive notice. Notice on behalf of two complaining parties, one of them being dead, was held not to support an action brought by the survivor (*t*). It is quite sufficient if the notice affords plain and substantial information of the cause of action; it is not necessary to describe in specific words

(*m*) *Danvers* v. *Morgan*, 1 Jur. N. S. Exch. 1051; see 2 & 3 Vict. c. 71, ss. 52, 53.

(*n*) *Staight* v. *Gee*, 2 Stark. 449; post, pp. 504, 505.

(*o*) *Young* v. *Higgon*, 6 M. & W. 49.

(*p*) *Breese* v. *Jerdein*, 4 Q. B. 585. *Martins* v. *Upcher*, 3 Q. B. 668. *Taylor* v. *Nesfield*, 23 Law J., M. C. 169; ib. Q. B. 371. *Jones* v. *Nicholls*, 13 M. & W. 361.

(*q*) *Macgregor* v. *Galsworthy*, 1 C. & K. 8.

(*r*) *Elstob* v. *Wright*, 3 C. & K. 35.

(*s*) *Bax* v. *Jones*, 5 Pr. 168.

(*t*) *Pilkington* v. *Riley*, 3 Exch. 741.

precisely how the injury took place; nor is it in all cases material to state precisely where the cause of injury arose (*u*). When the statute requires the name and place of abode of the attorney of the party giving the notice to be indorsed on the notice, any material error or misstatement calculated to mislead will invalidate the notice; but if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantage that the act intended to confer upon him, it will be sufficient, and it is for the defendant to show that the error or misstatement, or insufficient description on the notice, has deprived him of the opportunity of taking advantage of the statute (*x*). The christian name of the attorney need not be written out at full length (*y*), nor need his private residence be specified; for the place where an attorney abides for the purpose of carrying on his business is his place of abode within the meaning of the statute. "Either will do, the place of residence or the place of business" (*z*). Care must be taken to address the notice to the right parties, and to serve it in the proper quarter (*a*).

Tender of amends.—The statutes requiring notice of action to be given further provide that no plaintiff shall recover for any wrongful proceeding in execution of the act if tender of sufficient amends shall have been made before action brought, and that if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum tendered or paid into court, they are to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited.

Payment of money into court.—Every constable and officer, and private person who is entitled to the ordinary statutory protection may, after action commenced, and before issue joined, pay money into court, and give evidence of such payment under the plea of Not guilty by statute; and if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum paid into court, they are bound to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited, and the defendant's costs are to be paid out of the money paid into court. If the plaintiff accepts such money in satisfaction of the damages, it is to be paid out of court to him, and the defendant is to pay him his taxed costs, and thereupon the action is to be determined (*b*).

Parties to be made plaintiffs—Master and servant.—The person actually assaulted is in general the only person who can maintain an action for damages, unless the assault has caused his death, in which case the action, if maintainable, must be brought by his personal representa-

(*u*) *Jones* v. *Bird*, 1 D. & R. 503; 5 B. & Ald. 837.
(*x*) *Osborn* v. *Gough*, 3 B. & P. 554.
(*y*) *James* v. *Swift*, 4 B. & C. 681.
(*z*) *Roberts* v. *Williams*, 4 Dowl. P. C. 486; 2 C. M. & R. 561.
(*a*) *Hider* v. *Dorrell*, 1 Taunt. 384.
(*b*) 11 & 12 Vict. c. 44, ss. 9, 11; ante, pp. 498, 499.

tive (ante, p. 338); or unless the party assaulted is a servant, and the master has lost the benefit of his service by reason of the assault, in which case an action for damages is maintainable both by the servant and the master; but the master cannot have an action for the beating unless the battery is so great that, by reason thereof, he loses the services of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of the loss of service (*c*).

Where two have a joint interest they may, as we have seen, join in the same action, but they cannot do so where the wrong done to one is no wrong done to the other, as in the case of false imprisonment, or assault and battery, where what one man suffers is altogether different from the injury that accrues to another from the same cause (*d*).

Of the parties to be made defendants.—Every private unofficial person not acting in a judicial capacity, or in the authorised execution of legal process (post, chs. 14, 15), is responsible in damages for a wrongful imprisonment, ordered, directed, or authorised by him (*e*). He is not responsible for the orders or decrees of judges and justices, before whom he has laid a complaint or made a charge; but if he officiously interferes and gives orders or directions to police constables for the imprisonment of the plaintiff, he will be responsible in damages if he is unable to excuse or justify the act. Where the defendant out of spite and ill-will, and for the purpose of getting the plaintiff out of the way, went to the place of rendezvous for the impress service near the Tower, and gave information there which caused the plaintiff to be seized by the press-gang and carried on board the tender, where he was detained until it was discovered that the information was false, and that he had never been in a ship before, it was held that the defendant was liable to an action for false imprisonment. "If a person," observes Lord Ellenborough, "causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said that she believed the plaintiff had been a sailor and was liable to be impressed, leaving it to the officer of the press-gang to make the necessary inquiries, and to act as he should think most advisable, she would not then have been amenable to this action, but she took upon herself positively to aver that the plaintiff was compellable to serve in a king's ship, and caused him to be seized, and she must answer for the consequences (*f*). Here the party giving the information was the sole moving cause of the arrest, and herself

(*c*) *Robert Mary's* case, 9 Co. 205.
(*d*) Best, C. J., *Barratt* v. *Collins*, 10 Moore, 451.
(*e*) Ante, pp. 8, 469, 480, 496.
(*f*) *Flewster* v. *Royle*, 1 Campb. 188.

trumped up a false story for the very purpose of wrongfully depriving the plaintiff of his liberty. There is a wide distinction, therefore, between this case and the case of a man who gives *bonâ-fide* information, or makes a *bonâ-fide* charge against another to a police constable, leaving the constable to make inquiry into the circumstances, and act as he may think fit in the matter.

Where a felony had been committed in the house of the defendant; and the latter sent for the police and complained of the robbery, and stated various circumstances of suspicion which had come to his knowledge, and the policeman made inquiry into these circumstances, and on his own authority arrested the plaintiff and took him to the police-station, and at the same time requested the defendant to come to the station and sign the charge-sheet, which he did, charging the plaintiff with the felony; it was held that these facts did not render the defendant responsible for a trespass, as charging a person with an offence was a different thing from giving him into custody. "The arrest and detention of the plaintiff," observes Pollock, C. B., "were the acts of the police-officer; and the defendant did nothing more than he was, under the circumstances, bound to do, viz. sign the charge-sheet. He might have been liable if he had acted *malâ fide*, but not otherwise. We ought to take care that people are not put in peril for making a complaint when a crime has been committed. If a charge be made *malâ fide*, there are ample means of redress" (*g*). But if the defendant gives the plaintiff in charge (*h*), or directs the policeman to take him into custody, he will be answerable in damages for the imprisonment if he cannot establish a justification (*i*), and the signing of a charge-sheet by the defendant is *primâ facie* evidence against him that he ordered and directed the arrest (*k*).

If a party, in answer to inquiries made by a sheriff or his officers, or a constable, gives information which he believes to be true, and does not himself take the initiative by putting the officers of justice in motion, he does not so identify himself with the imprisonment as to make it his act, and is not amenable to an action for damages if the officers, acting upon his information, arrest a wrong party. The officers in such a case act according to their own judgment and discretion in the matter, and upon their own responsibility, taking upon themselves the risk of the information turning out to be incorrect. In these cases, however, much will depend upon the circumstances under which the information was given,

(*g*) *Grinham* v. *Willey*, 4 H. & N. 499; 28 Law J., Exch. 242; 7 W. R. 463. *Brown* v. *Chapman*, 6 C. B. 374.

(*h*) *Hopkins* v. *Crowe*, 4 Ad. & E. 774. *Wheeler* v. *Whiting*, 9 C. & P. 262.

(*i*) *Warner* v. *Riddiford*, 4 C. B., N. S. 200. Ashurst, J., *Morgan* v. *Hughes*, 2 T. R. 231. *Stonehouse* v. *Elliott*, 6 ib. 315.

(*k*) *Harris* v. *Dignum*, 29 Law J., Exch. 23.

the degree of active interference on the part of the defendant, and the character of the information itself; for there are statements which no man ought to make, and there is information which no person ought to give, without ascertaining beforehand whether it be true or false.

All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it (*l*).

If a party has been arrested and imprisoned under the authority of legal process which has been set aside as irregular, both the attorney who sued out the process and the client who set the attorney in motion are responsible in damages in an action for an assault and false imprisonment; for as the client gives to the attorney the right to represent him in the conduct of a cause, he is responsible for whatever the attorney does within the scope of his authority. The writ is a justification to the officer of the court who acted under it, and had no option but to obey it (post, ch. 14), but it is no protection, after it has been set aside, to the attorney who sued it out (*m*), or to the client who set the attorney in motion (*n*).

Liability of a corporation to an action for an assault.—An action for an assault and battery will lie against a corporation whenever the corporation can authorise the act to be done, and it has been done by their orders or authority (*o*).

Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong.—An action will lie against every person who has ratified and adopted an act of imprisonment effected or ordered by his servant or agent for his use and benefit, although the imprisonment was effected in the first instance without his knowledge. "But he that agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment" (*p*). An imprisonment of a party liable to a railway company for not having paid his fare is an act for the benefit of the company, which may be ratified by the company (*q*).

Declarations for an assault and false imprisonment.—The venue or county where an action for an assault and false imprisonment is to be tried, must be stated in the margin of the plaintiff's declaration of his cause of action (*r*), and the venue is local and must be laid, as we have

(*l*) *Griffin* v. *Coleman*, 28 Law J., Exch. 137; 4 H. & N. 265.

(*m*) *Parsons* v. *Lloyd*, 2 W. Bl. 844.

(*n*) *Barker* v. *Braham*, 2 ib. 865; post, ch. 17, s. 2. *Collett* v. *Foster*, 2 H. & N. 361.

(*o*) *Goff* v. *Gt. North.*, 30 Law J., Q. B. 148.

(*p*) 4 Inst. 317.

(*q*) *Eastern Counties Rail. Co.* v. *Broom*, 6 Exch. 327. *Goff* v. *Gt. North. Rail. Co.*, ut sup.

(*r*) Reg. Gen. Hil. T. 16 Vict.; 1 Ell. & Bl. App. lxxix. 4.

seen, within the county where the trespass or wrong was done in all actions against justices of the peace, mayors, bailiffs, constables, tax-collectors, churchwardens, overseers and their deputies, and other public officers, for anything done by them touching or concerning their offices (*s*), and in all actions for anything done under the Malicious Trespass Act (*t*). When the action is brought pursuant to a notice of action (ante, p. 500), and the action is not maintainable without notice of action, the declaration must disclose the same cause of complaint as is contained in the notice (*u*).

The short form of declaration in a common case of false imprisonment given in the schedule of the Common Law Procedure Act, 15 & 16 Vict. c. 76, merely alleges "that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police-office."

What may be given in evidence under the plea of NOT GUILTY.—Under the plea of Not guilty in an action for an assault, or battery, or wounding, those facts only can be given in evidence which tend to show that the defendant did not do the act complained of (*x*). Any defence which admits the trespass and seeks to show the fact of its being excusable by some accident, or justifiable, is matter for a special plea (*y*). If the act complained of has been done by the leave and license or permission of the plaintiff, it is not an assault, and the leave and license may consequently be given in evidence under the plea of Not guilty. If two persons agree to play at cricket together, and the one strikes the other with the ball in the course of the game, this is not an assault, for "it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and license or permission of the latter" (*z*).

If two persons proceeding through the streets on foot or on horseback, or driving carriages and horses, run or drive against each other, the question as to which of them caused the collision, or struck the person of the other, is raised by the general issue of Not guilty (*a*). If both are in fault and both caused the collision, so that it is impossible to fasten the wrong and injury exclusively upon the one or the other, the evidence tending to establish such a state of facts is likewise admissible under the plea of Not guilty. If the act complained of is the exclusive act of the defendant; if he drives against a horse or carriage which is standing still in the street, or over a drunken man who is lying down on the road, or

(*s*) 21 Jac. 1, c. 12, s. 5. Touching or concerning their offices means, that they were intending to act under colour of their office, although by error and mistake they did not in point of fact do so. *Staight* v. *Gee*, 2 Stark. 448; and see post, ch. 15.

(*t*) 7 & 8 Geo. 4, c. 30, s. 41. *Thomas* v. *Saunders*, 5 B. & Ad. 462.

(*u*) *Elstob* v. *Wright*, 3 C. & K. 39.

(*x*) *Pearcy* v. *Walter*, 6 C. & P. 232.

(*y*) *Hall* v. *Fearnley*, 3 Q. B. 921.

(*z*) *Christopherson* v. *Bare*, 11 Q. B. 477.

(*a*) *Pearcy* v. *Walter*, 6 C. & P. 232.

over a person who has fallen from the kerb or footway into the carriage-way, and the defendant seeks to set up some excuse or justification on the ground that it was an inevitable accident, he must plead the facts specially on the record (*b*). But if he seeks to show that the act was not his act, and that he was not a voluntary agent in the matter, the evidence pointing to such a result is admissible under the plea of Not guilty. Thus, if a horse being suddenly frightened by a flash of lightning or clap of thunder runs away with his rider, and the latter loses all power and control over the animal, and is unable to guide him, the injuries inflicted by the ungovernable horse under such circumstances are not injuries done by the rider, and the latter is in substance not guilty of committing them (*c*). It may be proved, under the plea of Not guilty, that the defendant is an officer of the Queen and government, and that the assault was committed by him whilst he was acting in discharge of his public duty as an officer carrying out the orders of his government (*d*).

Of the plea of Not guilty.—Every defence which goes to show that the imprisonment complained of was not the act of the defendant is admissible under the plea of Not guilty ; such as, that the defendant went before a magistrate and preferred his complaint to the magistrate, who thereupon issued his warrant for the apprehension of the defendant (*e*), or that the defendant accused the plaintiff of embezzlement, and that the plaintiff insisted on having the charge investigated, and accompanied the defendant to a magistrate, who, on hearing the charge, ordered the plaintiff to be placed in the dock as a prisoner, to answer it, and detained him until the charge had been heard, and then dismissed him (*f*).

Not guilty by statute.—Acts of parliament containing clauses for the protection of persons intending to act in the execution of the statute provide, as we have seen (ante, p. 498), that the defendant may give the act and the special matter in evidence under the general issue, and that the acts were done in pursuance or by the authority of the act, and that if they shall appear to be so done, the jury shall find for the defendant. To enable a defendant to avail himself of the plea of Not guilty by statute, and to give special circumstances of justification or excuse in evidence under it, he must show that the act complained of was done under the authority and pursuant to the powers and provisions of the statute upon which he relies (*g*), or if the privilege is given to persons holding certain offices, and, being clothed with a certain official character, it must be shown that he had, in point of fact, been appointed to the office (*h*). In

(*b*) *Hall* v. *Fearnley*, 3 Q. B. 919. *Knapp* v. *Salisbury*, 2 Campb. 500. *Cotterill* v. *Starkey*, 8 C. & P. 691.

(*c*) *Gibbons* v. *Pepper*, 2 Salk. 637 ; 1 Ld. Raym. 38 ; 4 Mod. 404.

(*d*) *Buron* v. *Denman*, 2 Exch. 167.

(*e*) *Barber* v. *Rollinson*, 1 Cr. & M. 330. *West* v. *Smallwood*, 3 M. & W. 421.

(*f*) *Brown* v. *Chapman*, 6 C. B. 374.

(*g*) *Witham Nav. Co.* v. *Padley*, 4 B. & Ad. 69.

(*h*) *Bush* v. *Green*, 4 Bing. N. C. 49.

every case in which a defendant pleads the general issue, intending to give special matter in evidence under or by virtue of an act of parliament, he must insert in the margin of the plea the words, "by statute," together with the year or years of the reign in which the act of parliament upon which he relies was passed, and the chapter and section of the act, and must specify whether the act is public or otherwise, or he will not be entitled to the benefit of the act; and such memorandum must be inserted in the margin of the issue and of the *nisi prius* record (*i*).

Plea of son assault demesne.—The plea of *son assault demesne* is a plea setting forth that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence (*j*).

Pleas setting forth a previous hearing and dismissal by magistrates.—By 9 Geo. 4, c. 31, s. 27, it is enacted, that where any person shall unlawfully assault or beat any other person it shall be lawful for two justices, upon complaint of the party aggrieved, to hear and determine such offence; and if the justices, upon the hearing, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit punishment, and shall dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And if any person (s. 28) shall have obtained such certificate, or having been convicted shall have paid the fine, &c., or suffered the imprisonment awarded, such party shall be released from all further proceedings for the same cause. If a certificate under this statute is relied upon as a defence, it must be specially pleaded (*k*), and shown to have been granted on one of the grounds specified in the act (*l*). If the plaintiff, after the defendant has been summoned before justices, and has appeared and pleaded "Not guilty," withdraws his complaint without offering any evidence, and the charge is dismissed, or if he gave notice that he did not mean to attend the hearing, and the defendant attended and claimed to have the information dismissed, the defendant is entitled to a certificate in the terms of the statute, which will be a complete bar to any subsequent action for the same assault, for the informant cannot withdraw so as to deprive the defendant of his right to a decision (*m*). If the magistrate takes cognizance of the complaint and decides it to be frivolous, he is bound forthwith to grant a certificate that he has so decided. The granting or withholding the certificate by the magistrate is not discretionary. The defendant is entitled to it *de jure*, and whether the complainant was present or absent at the time of the

(*i*) Reg. Gen. 16 Vict. App.; 1 Ell. & Bl.

(*j*) 15 & 16 Vict. c. 76, Sched. B; ante, pp. 483–487.

(*k*) *Harding* v. *King*, 6 C. & P. 427.

(*l*) *Skuse* v. *Davis*, 10 Ad. & E. 639.

(*m*) *Tunnicliffe* v. *Tedd*, 5 C. B. 553. *Vaughton* v. *Bradshaw*, 9 C. B., N. S. 115. *Bradshaw* v. *Vaughton*, 30 Law J., C. P. 93.

grant of such certificate is wholly immaterial (*n*). When the complaint has been once duly made before justices, it cannot be withdrawn, and further proceeding upon it discontinued by arrangement between the parties, if the justices think fit to oppose such an arrangement (*o*).

The word "forthwith," in s. 27 of the statute, does not mean that the certificate is to be granted forthwith upon the dismissal of the complaint by the magistrate, but forthwith upon the application of the party entitled to the certificate. It is not the duty of the magistrate to grant the certificate not being asked for it, but when the magistrate is asked for it he cannot refuse it; it is a record merely of what he has judicially decided, and is demandable *ex debito justitiæ*. If, therefore, justices refuse to grant the certificate on application made to them, the Court of Queen's Bench will grant a mandamus to compel them to do it (*p*).

Pleas of justification.—When there are several distinct and separate assaults charged in the declaration, the defendant, by his plea of justification, must cover and answer the whole chain of trespasses, and show the circumstances leading to each assault, and exonerating the defendant from liability (*q*), and if any one of the long series of wrongful acts is left unanswered, the plaintiff will be entitled to a verdict (*r*). But where the attendant circumstances afford mere matter of aggravation and amplification of the original trespass, and do not in themselves constitute substantive trespasses, it is sufficient if the defendant justifies the principal act (*s*).

When the trespass is a continuing trespass, consisting of a series of acts connected together, but extending over a considerable interval of time, the acts constituting the entire trespass are divisible, and the defendant may plead not guilty to, or traverse some of them, and justify others. Where the plaintiff's declaration alleged that the defendant entered the plaintiff's house and stayed therein four days, and the defendant set up a justification entitling him to enter and stay two days, to which the plaintiff replied, denying his right to enter at all, but alleging that if he had the right, it was to stay two days only, and that he had stayed two days more without any colour of authority, it was held that the trespass was divisible, and the replication good (*t*). If there are divers counts in the plaintiff's declaration embracing divers assaults, and the defendant by his plea narrows them all to one assault, and justifies that, and the plaintiff takes issue, he is confined to the assault set forth in the plea (*u*).

(*n*) *Hancock* v. *Somes*, 28 Law J., M. C. 196.

(*o*) *Reg.* v. *Hawkins*, 2 N. R. (1863), p. 62.

(*p*) *Costar* v. *Hetherington*, 28 Law J., M. C. 198, overruling *Rex* v. *Robinson*, 12 Ad. & E. 672.

(*q*) *M'Curday* v. *Driscoll*, 1 C. & M. 618. *Stammers* v. *Yearsley*, 10 Bing. 35. *Noden* v. *Johnson*, 16 Q. B. 218.

(*r*) *Bush* v. *Parker*, 4 M. & Sc. 588; 1 Bing. N. C. 72.

(*s*) *Taylor* v. *Cole*, 1 H. Bl. 561.

(*t*) *Loweth* v. *Smith*, 12 M. & W. 582. *Worth* v. *Terrington*, 13 M. & W. 789.

(*u*) *Gale* v. *Dalrymple*, R. & M. 118.

Pleas justifying in defence of possession of house or land should set forth the defendant's possession of the house, &c., that the plaintiff was trespassing thereon, that the defendant requested him to depart, that the plaintiff refused so to do, and that the defendant thereupon laid his hands on the plaintiff and removed him from the said house, &c., using no more violence than was necessary for the purpose. In an action for assaulting and beating the plaintiff with a stick, the defendant pleaded that he was possessed of a close, and that the plaintiff attempted forcibly to break into and enter the said close, that the defendant resisted and opposed such entrance, and defended his possession of the said close, and if any damage or injury happened to the plaintiff it was occasioned by the defence of the possession of the said close, and it was held that the plea was an answer to the action. "The defendant ought not," it was observed, "in the first instance to begin with striking the plaintiff; but the law allows him either in defence of his person or possession, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery follows from the resistance" (*x*).

Defence of personal property.—If the assault was committed in defence of the possession of personal property, the plea should set forth the defendant's possession of the property (describing it), and should state that the plaintiff endeavoured to take it out of the possession of the defendant, and that the defendant then prevented him, and in so doing necessarily committed the assault of which the plaintiff complains (*y*).

Defence of neighbours and friends.—If the assault complained of was committed by the defendant in the necessary and proper defence of a third party from the unlawful violence of the plaintiff, it is justifiable under a plea to the effect that the plaintiff first assaulted A. B., being the child or relative, wife, husband, servant, apprentice, neighbour, or friend of the defendant, and was continuing to do so, whereupon the defendant laid his hands on the plaintiff to defend the said A. B. against the plaintiff, and to prevent him from further assaulting the said A. B (*z*).

Moderate correction by parents and masters, and persons in authority.—To an action of trespass for an assault and battery, it is a good plea to plead that the party assaulted was the son of the plaintiff, and was an infant within the age of twenty-one years, still domiciled under the paternal roof, and under the care and control of the plaintiff, that he behaved saucily and contumaciously to the plaintiff, and refused to obey his lawful commands, whereupon the plaintiff moderately and in a reasonable manner chastised his said son (*a*); or that the plaintiff was the

(*x*) *Weaver* v. *Bush*, 8 T. R. 78.
(*y*) *Roberts* v. *Taylor*, 1 C. B. 147.
(*z*) *Leward* v. *Baseley*, 1 Ld. Raym. 62; 1 Salk. 407; 3 Salk. 40.
(*a*) *Winterburn* v. *Brooks*, 2 Car. & Kirw. 16.

apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he had a right to do (*b*); or that the defendant at the time of the assault was the captain of a merchant vessel trading to China, and the plaintiff was a mariner on board the vessel, serving under the orders of the defendant; that the plaintiff conducted himself in a mutinous and disorderly manner, and refused to obey the lawful and necessary commands of the defendant, whereupon the defendant caused the plaintiff to be moderately and properly corrected and flogged (*c*). If the chastisement has been immoderate, the excessive beating must be specially replied.

Pleas of justification of imprisonment.—If a man does any act which is *primâ facie* a trespass, he must, unless the act were done under the authority of an act of parliament enabling the defendant to plead the general issue and give the special matter of justification in evidence under it, justify the act, by showing the authority under which he acted; as, for instance, if there be a judgment against a party, and a process is issued to take him in execution, and the sheriff takes him on that process, he must show his authority for so doing (*d*). A plea of justification of imprisonment, ordered, or directed, or authorised by a private individual, on the ground that a felony had been committed, and that there was reasonable ground to suspect the plaintiff of having committed it, must state the particulars of the felony, and set forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest, in order that the judge may determine whether they amount to reasonable and probable cause for arresting and imprisoning the plaintiff (*e*). The question of reasonable and probable cause is a question for the judge and not for the jury (*f*).

A justification of an imprisonment on the ground that the plaintiff had committed felony, and an abandonment of the plea at the trial, or a failure to prove it, is evidence of malice, and a great aggravation of the original wrong; but a justification of a false imprisonment on the ground that a felony had been committed; and the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of it, is very different. Such a justification is in the nature of an apology for the defendant's conduct (*g*).

An imprisonment cannot be justified on the ground that the plaintiff unlawfully entered the defendant's house and made a great noise and disturbance therein, and would not depart when requested so to do,

(*b*) *Penn* v. *Ward*, 2 C. M. & R. 338.

(*c*) *Lamb* v. *Burnett*, 1 Cr. & J. 295.

(*d*) As to pleas of justification of imprisonment under colour of legal process, see post, ch. 14.

(*e*) Maule, J., *West* v. *Baxendale*, 9 C. B. 152. *Broughton* v. *Jackson*, 21 Law J., Q. B. 265. *Mure* v. *Kaye*, 4 Taunt. 34.

(*f*) *Hailes* v. *Marks*, 30 Law J., Exch. 392.

(*g*) *Warwick* v. *Foulkes*, 12 M. & W. 509.

whereupon the defendant sent for a police-officer and gave the plaintiff into custody (*h*). To make the plea good, there must be a direct allegation, either of a breach of the peace, continuing at the time of the giving of the plaintiff in custody, or that a breach of the peace had been committed, and that there was reasonable ground for apprehending its renewal (*i*).

In an action for an assault and false imprisonment the defendant justified, on the ground that he was possessed of a house and shop, that the plaintiff was unlawfully therein, and was requested to depart, which he refused to do, whereupon the defendant gently laid hands on him to remove him, that the plaintiff then assaulted the defendant in the presence of a police-officer, and was given into custody. At the trial it was not shown that any assault had been committed by the plaintiff upon the defendant, and it was held that the imprisonment was unlawful, and the plaintiff entitled to damages (*k*).

If the defendant pleads that he had a right to imprison the plaintiff for a certain reasonable time to preserve the peace, or prevent him from disturbing divine service, the time is divisible, and the plaintiff may by his replication deny that there was any cause for imprisoning him, but that if there was, the imprisonment was for a longer time than was justified by such cause (*l*).

If the defendant relies upon the fact of his being a superior officer in the army or navy, and of his having imprisoned the plaintiff in order to bring him before a court-martial, and that he did so bring him, and relies on the sentence of the court-martial as conclusive, he should plead the facts by way of estoppel, and not leave them at large to be considered by a jury (*m*).

Evidence at the trial—Proof of an assault.—In order to prove an assault, the plaintiff must show that he was actually struck by the defendant, or that the defendant threatened to strike him, or to inflict some injury upon him, having the means of carrying that threat into effect (ante, pp. 481, 482). We have already seen that there may be a constructive as well as an actual assault, and that a threatening gesture is, under certain circumstances, sufficient to constitute an assault (ante, pp. 481, 482). Where one assault only is charged in the plaintiff's declaration of his cause of complaint, the plaintiff is confined to the proof of one assault. He is not bound to the precise time stated in the declaration, but may prove an assault on another day (*n*). Having, however,

(*h*) *Green* v. *Bartram*, 4 C. P. 308. *Rose* v. *Wilson*, 8 Moore, 362; 1 Bing. 353.

(*i*) *Grant* v. *Moser*, 5 M. & Gr. 123; 6 Sc. N. R. 46. *Price* v. *Seeley*, 10 Cl. & Fin. 39.

(*k*) *Reece* v. *Taylor*, 4 N. & M. 469.

(*l*) *Worth* v. *Terrington*, 13 M. & W. 789.

(*m*) *Hannaford* v. *Hunn*, 2 C. & P. 146.

(*n*) *Cheasley* v. *Barnes*, 10 East, 80. *Polkinhorn* v. *Wright*, 8 Q. B. 206; Litt. sec. 485.

proved one assault, he cannot go on to prove other prior or subsequent distinct assaults, for the purpose of enhancing the damages or selecting the best to rely upon (*o*). If the assault is of a continuing nature, and consists of a series of wrongful acts of violence, following one upon the other, so as to constitute one continued wrongful act, then the wrong being of a continuous nature, the various acts of violence may be given in evidence as constituting one continuing trespass (*p*).

Proof of battery.—In order to prove a battery or beating, it must be shown that the person of the plaintiff was actually touched or struck (ante, p. 483). But it is not the act of striking or hitting alone that is to be regarded, but the act and intention together, for one man may push another merely in joke (ante, p. 483). An assault does not, as we have seen, include a battery, but every battery includes an assault.

Proof of an arrest and imprisonment.—It is not necessary, in order to constitute an arrest, that there should be a power of detention of the party arrested. If, therefore, an officer, in the execution of civil process, touches a person through a window without breaking the premises, this is a good arrest (*q*). In order to establish the fact of an imprisonment, the plaintiff must prove that some restraint was placed upon his personal freedom by the defendant. We have already seen that an imprisonment may be either actual or constructive, and that proof of personal violence is not necessary to prove an imprisonment. It is sufficient to show that the plaintiff was awed into submission, and that he did submit to a restraint imposed upon his personal liberty (ante, p. 487), and that the defendant was the person who procured or instigated the restraint, and caused it to be imposed upon the plaintiff (ante, p. 504).

A *primâ facie* case will be established against a defendant in an action for false imprisonment, by showing that the plaintiff was taken into custody by a policeman, and that the defendant came down to the station-house and signed a charge-sheet accusing the plaintiff of having committed felony (*r*). It is not absolutely necessary to show that the defendant gave any personal orders or directions to the police touching the arrest, in order to establish a *primâ facie* case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances, and the conduct and acts of the defendant or his servants, raise a fair and reasonable presumption that the wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption; and if no evidence is

(*o*) *Stante* v. *Pricket*, 1 Camph. 472.; Bull, N. P. 86. *English* v. *Purser*, 6 East, 395. *Taylor* v. *Smith*, 7 Taunt. 156.

(*p*) *Monkton* v. *Ashley*, 6 Mod. 38; Salk. 638. *Burgess* v. *Freelove*, 2 B. & P. 425.

(*q*) Anon. 7, Mod. 8. *Sandon* v. *Jervis*, Ell. Bl. & Ell. 935; 28 Law J., Exch. 156.

(*r*) *Harris* v. *Dignum*, ante, p. 505.

offered by him for that purpose the jury are justified in finding him guilty (*s*). If the defendant charged the plaintiff with a felony in the presence of a policeman, and stands by and sees the plaintiff taken into custody, and is silent, this is evidence of the defendant's having authorised or directed the policeman to act in the matter (*t*). But if it appears that he merely made complaint, and gave *bonâ-fide* information to a constable, who inquired into the circumstances, and then made the arrest on his own responsibility, the constable making the arrest, and not the party making the complaint and giving the information, will be responsible for the imprisonment (*u*).

A declaration alleging that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a declaration in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution, and, therefore, requires no evidence of malice or want of reasonable and probable cause (*x*).

Defence that the action is brought in the wrong county.— It is in general a good defence that the action is not brought in the county or borough where the cause of action arose, when the action is brought for something done in pursuance of any of the statutes previously enumerated, requiring notice of action to be given (ante, p. 498).

Evidence for the defence.—The facts which may be given in evidence under the plea of Not guilty, to rebut a *primâ facie* case on the part of the plaintiff, have already been pointed out (ante, pp. 507–509). If the defendant relies upon a plea of *son assault demesne* (ante, p. 509), he must show an assault by the plaintiff commensurate with the assault charged upon the defendant; for if the assault proved to have been committed by the plaintiff is trifling, and altogether disproportioned to the assault committed by the defendant, and forms no excusable or justifiable cause for it, the plaintiff will be entitled to a verdict (*y*). Where, under a plea of *son assault demesne*, the defendant proved that the plaintiff got off his horse, and held up his stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation, justifiable, and that, if the plaintiff relied upon the fact of the defendant's having beaten him more violently than he ought to have done, the excessive beating should have been replied, and specially set forth on the record (*z*). If the plaintiff complains of having been struck with a stick by the defendant, the defendant

(*s*) *Glynn* v. *Houston*, 2 Sc. N. R. 554.

(*t*) *Warner* v. *Riddiford*, 4 C. B., N. S. 200.

(*u*) *Grinham* v. *Willey*, ante, p. 505.

(*x*) *Chivers* v. *Savage*, 5 Ell. & Bl. 697. *Brandt* v. *Craddock*, 27 Law J., Exch. 314.

(*y*) *Dean* v. *Taylor*, 11 Exch. 68. *Cockcroft* v. *Smith*, 1 Salk. 641; Littledale, J., *Reeve* v. *Taylor*, 4 N. & M. 470.

(*z*) *Dale* v. *Wood*, 7 Moore, 33. *Penn* v. *Ward*, 2 C. M. & R. 338.

may, under a plea of *son assault demesne*, show that the plaintiff first struck him with his fist (*a*).

If the defendant rests his defence upon a plea of the previous hearing and dismissal of the charge by magistrates (ante, p. 509), he must produce the certificate of the fact of the dismissal, signed by two justices, which will be *primâ facie* evidence of the dismissal of the complaint, without proof of the genuineness of the signatures of the magistrates who have signed it (*b*). If the defendant relies upon some plea of justification or excuse (ante, pp. 510–513), he must prove so much of his plea as constitutes an answer to the assault to which it is pleaded. If he does that, it is enough, and he is not bound to prove the residue of his plea (*c*). If the plea of justification consists of two facts, each of which would, when separately pleaded, amount to a good defence, the plea of justification will be supported if one of these facts only be found by the jury (*d*).

The usual defences to an action for an assault, and the material circumstances of justification and excuse, have already been considered (ante, pp. 484–487), also the nature of the evidence requisite to support the various pleas that the assault was in self-defence (ante, pp. 483, 484), or in defence of the possession of a house or close, or of goods and chattels (ante, p. 484), or of the undisturbed enjoyment of a shop or public-house (ante, p. 484), or in resistance of a forcible entry (ante, p. 485), or in preservation of the public peace (ante, p. 485), or in the moderate correction of children, servants, or apprentices (ante, pp. 511, 512), or in defence of some neighbour or friend (ante, p. 511).

When the defendant justifies in defence of his possession of realty or personalty, he must prove the fact of his possession at the time he committed the assault, and that the assault was of a defensive and not an offensive character (*e*). When he justifies an imprisonment on the ground that a felony had been committed, and sets forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest (ante, p. 512), "it is for a jury to determine whether the facts set forth on the face of the plea are proved, and for the judge to determine whether or not they amounted to reasonable and probable cause, not for suspecting, but for arresting and imprisoning, the plaintiff" (*f*).

"Probable cause," observes Tindal, C. J., "is, no doubt, a question of law, and within the province of a judge to decide; but the jury must not

(*a*) *Blunt* v. *Beaumont*, 2 Cr. M. & R. 412. *Oakes* v. *Wood*, 3 M. & W. 150.

(*b*) 8 & 9 Vict. c. 113, s. 1; post, ch. 21.

(*c*) *Atkinson* v. *Warne*, 1 C. M. & R. 827.

(*d*) *Spilsbury* v. *Micklethwaite*, 1 Taunt. 149.

(*e*) Ante, pp. 484–487. *Dean* v. *Hogg*, 10 Bing. 349.

(*f*) Maule, J., *West* v. *Baxendale*, 9 C. B. 152. *Mure* v. *Kaye*, 4 Taunt. 34. *Broughton* v. *Jackson*, 21 Law J., Q. B. 265. *Hailes* v. *Marks*, ante, p. 512.

only find the facts which are supposed to constitute probable cause, but they are also warranted in forming their conclusion from those facts, and it is frequently difficult to draw the line between matter of law and matter of fact" (*g*). If, in the opinion of the judge, founded on facts proved before a jury, there was reasonable ground for suspecting either that the plaintiff had committed, or that he was about to commit, a felony, he cannot recover damages from a constable for arresting and detaining him, although no felony had, in fact, been committed (*h*).

Damages recoverable.—"The court," observes Tindal, C. J., "never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter" (*i*). The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offence and the amount of damages. "It is a greater insult to be beaten upon the Royal Exchange than in a private place" (*k*). When the assault is accompanied by a false charge, affecting the honour, character, and position in society of the plaintiff, the offence will, of course, be greatly aggravated, and the damages proportionably increased; and if the plaintiff has been assaulted and imprisoned under a false charge of felony, where no felony has been committed (ante, p. 490), or where there was no reasonable ground for suspecting and charging the plaintiff, exemplary damages will be recovered.

Circumstances of provocation and excuse may be given in evidence, in mitigation of damages, so long as they do not amount to a justification, and could not be pleaded as such (*l*). But if they constitute an answer to the action by way of justification for the assault, they must be pleaded, and cannot then be given in evidence in reduction or mitigation of the damages (*m*). Where, in an action for an assault, it was contended that the blow was unintentionally struck, the defendant intending to strike A. when he accidentally in the scuffle struck B, Bosanquet, J., told the jury that there could be no doubt but that, as the defendant struck the plaintiff, the plaintiff was entitled to a verdict, whether it was done intentionally or not, but that the intention was material in determining the amount of damages (*n*). If it be proved that the blow was unintentionally struck, and that an apology was immediately offered, the evidence would tend materially to reduce the amount of damages.

Where the plaintiff, in an action for an assault and false imprisonment,

(*g*) *Davis* v. *Russell*, 2 M. & P. 604; 5 Bing. 354.

(*h*) *Beckwith* v. *Philby*, 6 B. & C. 635; 9 D. & R. 487.

(*i*) *Edgell* v. *Francis*, 1 Sc. N. R. 121. *Huckle* v. *Money*, 2 Wils. 206.

(*k*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*l*) Post, ch. 22, s. 1.

(*m*) *Watson* v. *Christie*, 2 B. & P. 224. *Speck* v. *Phillips*, 7 Dowl. 473. *Linford* v. *Lake*, 3 H. & N. 276.

(*n*) *James* v. *Campbell*, 5 C. & P. 372.

sought to make the defendant responsible for the consequences of a remand by the magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any subsequent detention thereunder, they being the acts of the justice (*o*); but the defendant will be liable for the injury resulting from the remand in an action for a malicious prosecution (*p*).

Where there are several co-trespassers.— Where several persons have associated themselves together in the pursuit of a common object, and they all trespass upon the plaintiff's land in following out the common design, each is answerable for the whole of the damage done by all (*q*). And whenever two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. The true criterion of damage in such cases is the whole injury which the plaintiff has sustained from the joint act of all. Where, therefore, two persons have a joint purpose, and thereby make themselves joint-trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage; but the malignant motive of one party cannot be made a ground of aggravation of damage against the other party, who was altogether free from any improper motive (*r*).

Prospective damages.— In all cases of serious assault the jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of violence perpetrated by the defendant, for the damages, when given, are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. Thus, where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages; and afterwards, and in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the former recovery was for a mere battery and this for maihem, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits, and not the consequences. And the distinction was pointed out between this case and one of continuing nuisance, where each continuance was a fresh nuisance (*s*). No fresh action, therefore, arises by reason of subsequent new damage resulting from the wrongful act, if the act itself were actionable; for, if the action were brought, all the

(*o*) *Lock* v. *Ashton*, 12 Q. B. 876.
(*p*) Post, ch. 13.
(*o*) *Hume* v. *Olducre*, ante, p. 265.
(*r*) *Clark* v. *Newsam*, 1 Exch. 140.
(*s*) *Fetter* v. *Beale*, 1 Ld. Raym. 339, 692.

damages which he ever could recover for that injury could be recovered by the plaintiff in that action if he succeeded (*t*).

Special damages in actions for false imprisonment.—Money paid by the attorney of the plaintiff to procure the release of the plaintiff from an unlawful imprisonment is recoverable as part of the damages naturally and directly resulting from the wrongful act, provided the plaintiff claims them in his declaration, "for a man may say that he has been forced to pay that which another, who is his agent, has been forced to pay for him" (*u*). The allegation that the plaintiff has been forced to pay, &c., is a material allegation, and proof of actual payment is necessary to support it. Every expense that the plaintiff necessarily incurs in order to restore himself to a complete state of freedom from imprisonment is recoverable as part of the damages, if the plaintiff has claimed them in his declaration. Where a plaintiff, by being bailed, obtained only an imperfect release, being in the hands and at the mercy of persons who might at any time render him back to gaol, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and that, if it were necessary for the plaintiff to set aside an inquisition in order to restore himself to a complete state of freedom, he was entitled to recover the expense thereof, as part of the damages of the original wrongful act (*x*).

Evidence in mitigation of damages.—In an action for false imprisonment in giving the plaintiff in charge to a police-officer, it may be shown, in mitigation of damages, that the plaintiff had for several days annoyed and insulted the defendant, by following him about the streets, and telling him to pay his debts (*y*). But all facts and circumstances amounting to a justification, or to a contradiction of a material fact admitted upon the record, must be specially pleaded, and cannot be given in evidence in mitigation of damages (*z*). In an action of assault, therefore, a defendant cannot, under a plea of not guilty, prove that he committed the assault in self-defence, or in fear of his life; and a sheriff who has imprisoned the plaintiff cannot, if he pleads not guilty only, give evidence of his writ in mitigation of damages (*a*).

The recovery of damages in an action for false imprisonment is no bar to an action for a malicious prosecution (*b*).

(*t*) Coleridge, J., *Bonomi* v. *Backhouse*, 27 Law J., Q. B. 390.

(*u*) *Pritchet* v. *Boevey*, 1 Cr. & M. 778.

(*x*) *Foxall* v. *Barnett*, 2 Ell. & Bl. 298. 23 Law J., Q. B. 7.

(*y*) *Thomas* v. *Powell*, 7 C. & P. 807; and see post, ch. 22.

(*z*) *Linford* v. *Lake*, 27 Law J., Exch. 334.

(*a*) *Speck* v. *Phillips*, 5 M. & W. 281.

(*b*) *Guest* v. *Warren*, 9 Exch. 379; 23 Law J., Exch. 121. Taylor's Ev. 1358, 3d ed.; post, ch. 22.

CHAPTER XIII.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION AND ARREST — MALICIOUS ABUSE OF LEGAL PROCESS.

SECTION I.—*Of malicious conspiracy, prosecution, and arrest — Malicious abuse of legal process.*—Malicious conspiracy — Malicious exhibition of articles of the peace — Malicious prosecution — What is evidence of want of reasonable and probable cause, and of malice — Prosecutions by parties conscious of the innocence of the accused — Prosecutions under the advice of counsel — Malicious complaints before magistrates, causing a warrant to be improperly issued — Ratification of pending proceedings — Causing search-warrant to issue — Malicious prosecution by court-martial — Malicious assertion of a legal right — Malicious and unfounded actions — Malicious execution — Maliciously causing an extent to issue — Malicious proceedings in bankruptcy — Malicious abuse of legal process — Malicious detention of judgment-debtors — Malicious arrest — Proof of actual custody.

SECTION II.—*Of actions for malicious arrest and malicious prosecution.*—Actions for a malicious arrest — Pendency of a rule for a criminal information against the defendant — Parties to be made defendants — Declaration of the cause of action — Pleadings, defences, and evidence — Damages recoverable.

SECTION I.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION AND ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.

Malicious conspiracy.—A conspiracy to do an unlawful act, and the doing of the act in pursuance of the conspiracy to the damage of the plaintiff, create a good cause of action against all the parties to the conspiracy. An indictment lies for the mere act of conspiring, but an action is not maintainable unless the plaintiff has been aggrieved, or has sustained "actual legal damage" by some overt act done in pursuance of the conspiracy (*c*).

Where the plaintiff's declaration of his cause of action set forth that he exercised the profession of an actor, and was engaged to perform in the character of Hamlet, in Covent Garden Theatre, and that the defend-

(*c*) Crompton, J., *Castrique* v. *Behrens*, 30 Law J., Q. B. 168.

ants and others maliciously conspired together to prevent the plaintiff from so performing, and from exercising his profession in the theatre, and in pursuance of the conspiracy hired and procured divers persons to go to the theatre and hoot the plaintiff, and the persons so hired did in pursuance of the conspiracy go to the theatre and hoot the plaintiff, and interrupted his performance, and prevented him from exercising his profession, and thereby caused the plaintiff to lose his engagement and divers gains and emoluments, and to be brought into public scandal and disgrace, it was held that the declaration disclosed a good cause of action (*d*).

But a conspiracy to institute legal proceedings and to obtain a judgment *in rem* by means of false testimony, and the giving of such testimony, and the procurement of the judgment to the pecuniary loss of the plaintiff, cannot be made the ground of an action for damages so long as the judgment remains unreversed, whether the judgment be the judgment of one of our own courts of justice or the judgment of a foreign tribunal, if it appears that the plaintiff had an opportunity, if he had thought fit to avail himself of it, of appearing and controverting the false testimony, or if it can be shown that he did appear and was heard, and that the matter was decided against him (*e*).

Where the plaintiff's declaration of his cause of action set forth that he was possessed of premises on which he carried on the business of a skin-dresser, and that the defendant and another person unlawfully and maliciously conspired together to procure possession of a portion of the said premises, and set up thereon a secret still for distilling spirits; that in pursuance of such conspiracy they induced the plaintiff to let to them a portion of the premises, by representing that they wanted them for the purpose of carrying on the business of ink-manufacturers; and that having thereby got possession of that part of the premises, they set up thereon certain private stills, and illegally distilled spirits, and caused it to appear that the plaintiff had himself set up the stills, and was illegally distilling upon his premises, and that the plaintiff in consequence thereof was arrested, convicted, fined, and imprisoned, averring that the plaintiff was wholly ignorant of the stills being on his premises, it was held that the action was not maintainable, as it did not appear that the arrest, conviction, and imprisonment of the plaintiff were the direct result of the wrongful act of the defendant, or that the defendant should in anywise be made responsible for the illegal acts contemplated by him. The defendant's act of conspiring, it was observed, merely enabled him to obtain possession of part of the plaintiff's premises. The only ground of damage was the plaintiff's being illegally convicted. And if it could have been shown that the conspiracy was entered into for the purpose of procuring a con-

(*d*) *Gregory* v. *Duke of Brunswick*, 6 M. & Gr. 205; ante, pp. 10, 11.

(*e*) *Castrique* v. *Behrens*, 30 Law J., Q. B. 163.

viction of the defendant for having possession of a secret still, or for unlawfully distilling, the only remedy would have been an action for a malicious prosecution; and to such an action the conviction of the defendant would be an answer, for it must be assumed that the facts relied upon by him were brought before the tribunal for his exculpation, and were decided against him (*f*).

Malicious exhibition of articles of the peace against another, supported by a false oath of threats having been used, may be made the foundation of an action for damages, notwithstanding that the accused party has been required to find sureties, and been imprisoned for default, for the truth of the articles cannot be controverted before the court, which has no discretion, and can pronounce no judgment on the truth of the facts, but are bound to act upon the statement sworn to before them (*g*). Where, therefore, the plaintiff's declaration of his cause of action set forth that the defendant falsely and maliciously, and without any reasonable or probable cause, made information on oath before a magistrate that the plaintiff had used certain specified threatening language to him, whereby the defendant went in fear of bodily harm, and then caused the plaintiff to be arrested and brought before justices of the peace, and required to find sureties, and to be imprisoned, it was held that the declaration disclosed a good cause of action, although it appeared that the proceeding terminated against the accused, it being founded upon a statement on oath, which the party charged was not at liberty to controvert (*h*).

Malicious prosecution.—To put the criminal law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action (*i*). "Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause" (*k*). But though abandoning a prosecution be not of itself proof of want of probable cause, yet where the prosecution is persisted in and kept hanging over the head of the plaintiff for a very long time, and is then dropped in the very hour of trial, there is strong

(*f*) *Barber* v. *Lesiter*, 7 C. B., N. S. 183.

(*g*) *Rex* v. *Doherty*, 13 East, 171. *Venafra* v. *Johnson*, 3 M. & Sc. 847; 10 Bing. 301.

(*h*) *Steward* v. *Gromett*, 7 C. B., N. S. 191; 29 Law J., C. P. 170.

(*i*) *Churchill* v. *Siggers*, 3 Ell. & Bl. 937.

(*k*) Tindal, C. J., *Willans* v. *Taylor*, 6 Bing. 186; 3 M. & P. 350; 2 B. & Ad. 845.

ground for supposing that the prosecutor had no justifiable reason for commencing it (*l*).

What is evidence of a want of reasonable and probable cause, and of malice.—The want of reasonable and probable cause for a malicious prosecution, and the evidence of malice, depend so much upon the particular circumstances of the individual case as to render it impossible to lay down any general rule upon the subject, but the facts ought to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused (*m*). If circumstances of suspicion existed which might have been readily removed by proper inquiry, and no inquiry at all was made, there is evidence of a want of reasonable and probable cause, and if in the opinion of the judge there was no reasonable or probable cause for the prosecution, the jury may, from that fact alone, infer malice (*n*). If a party prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. "By the term malice, is meant any indirect motive of wrong. Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it. If a case is trumped up out of very weak and flimsy materials, for purposes of annoyance or of frightening other people, and deterring them from committing depredations upon private property, there is no legitimate foundation for a criminal prosecution, and persons who put the criminal law in motion under such circumstances lay themselves open to a charge of being influenced by malice" (*o*).

From the most express malice, the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt, and in neither case is he liable to an action. With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict (*p*).

Prosecution by parties who manifest a consciousness of the innocence of the accused.—Proof of the absence of belief in the truth of the charge by the party making it and putting the criminal law in motion, is almost always involved in the proof of malice. Where the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence, and

(*l*) Gaselee, J., ib. 190.

(*m*) Tindal, C. J., 6 Bing. 186; 2 B. & Ad. 845. *Farmer* v. *Darling*, 4 Burr. 1972.

(*n*) *Busst* v. *Gibbons*, 30 Law J., Exch. 75.

(*o*) *Stevens* v. *Mid. Rail. Co.*, 10 Exch. 356; 23 Law J., Exch. 328.

(*p*) Patteson, J., *Turner* v. *Ambler*, 10 Q. B. 257. *Hailes* v. *Marks*, 7 H. & N. 96.

it was proved that the defendant, on being told that there was not sufficient ground for the indictment, declared that it was of no matter, and that it would tie up the mouth of the plaintiff in a proceeding in which he would be likely to give evidence against the defendant, it was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution *bonâ fide* under such a belief or from an improper motive, and in telling them that if the defendant had acted from an improper motive they might infer malice (*q*).

If a person has been assaulted with a consciousness that, by his own misconduct, he provoked the assault, and has no reasonable ground to complain of it, and he nevertheless prefers an indictment, upon which the plaintiff is tried and acquitted, it is for a jury to say whether the defendant instituted the prosecution with a consciousness that he was wrong; and if they think so, there is a total absence of reasonable and probable cause for it, and evidence from which malice is fairly to be inferred (*r*). If the defendant appears to have put the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods unlawfully detained, without having any reasonable ground for preferring a criminal charge, there is evidence of malice, and of want of reasonable and probable cause for the prosecution (*s*).

If a man's own declarations and conduct, or the surrounding circumstances of the case, show that an act, which was made the foundation for a charge of felony, was not believed by the prosecutor himself to be a felony, there is no reasonable or probable cause for a charge of felony. If the circumstances show that the prosecutor believed that a party he proceeded against as a thief took the goods under an erroneous notion that he had a lien upon them, or had a right to take and detain them, there is evidence of malice, and of want of reasonable and probable cause for the prosecution for a felony (*t*). In an action for a malicious prosecution of the plaintiff by the defendant for obtaining goods from the defendant by false pretences, it appeared that the plaintiff, who had been insolvent, went to the shop of the defendant in his absence and obtained five shillings' worth of marble hall-paper from his assistant, saying that it was for Mr. Hills, a neighbour, and that the bill was to be made out to Mr. Hills, which was done, and the bill was delivered to the plaintiff, who took it and the paper away with him; but Mr. Hills had not authorised the plaintiff to get the paper, and would not pay for it, and the defendant was

(*q*) *Haddrick* v. *Heslop*, 12 Q. B. 267. *Broad* v. *Ham*, 8 Sc. 50; 5 Bing. N. C. 722.

(*r*) *Hinton* v. *Heather*, 14 M. & W. 131.

(*s*) *Brooks* v. *Warwick*, 2 Stark. 393. *M'Donald* v. *Rooke*, 2 Bing. N. C. 219; ante, p. 522.

(*t*) *Huntley* v. *Simson*, 2 H. & N. 600; 27 Law J., Exch. 134.

told this a few hours after the paper had been obtained, and knew who the plaintiff was, and where he resided, but made no complaint against him for three months; and being asked the reason, said that the transaction had slipped his memory, until he was going through his books, when, seeing the entry of the paper against Mr. Hills, he went to him, and finding that he still repudiated the transaction, and refused to pay for the paper, he went before a magistrate, and charged the plaintiff with having obtained the paper by false pretences. Upon these facts Wightman, J., asked the jury, first, whether they thought the plaintiff obtained the paper by falsely pretending that it was for Mr. Hills; and this question being answered in the affirmative, they were then asked whether they thought that the defendant, at the time he went before the magistrate, believed that the plaintiff intended to defraud him of the price of the paper; and this question being answered in the negative, Wightman, J., held that there was no reasonable and probable cause for the prosecution (*u*).

Any statements or declarations made by the defendant tending to show that he was actuated by spite and ill-will in instituting the prosecution is of course evidence of malice (*x*). "When a person says to the prosecutor of an indictment for perjury that there really is no case against the man he has indicted, and the prosecutor answers, 'I indict him to stop his mouth,' there is reasonable evidence from which a jury may infer that the prosecutor knows that the man is not guilty, but only indicts him for the purpose he has mentioned" (*y*).

The fact that overseers of the poor have got out a summons before justices, and have caused a warrant of distress and a warrant of arrest to issue against the plaintiff for the non-payment of poor-rates, they knowing at the time that the plaintiff was bankrupt, and had obtained his protection, is no evidence of malice to support an action for a malicious prosecution against the overseers (*z*).

Prosecutions under the advice of counsel.—It is no answer to an action for a malicious prosecution to show that the defendant was bound over by recognizance to prosecute and give evidence, if it appears that the prosecution originated in malice, and that the recognizance was the result of prior malicious proceedings, instigated by the defendant (*a*). Counsel's opinion is of no avail to a man who has instituted an unfounded and malicious prosecution. "It would be a most pernicious practice," observes Heath, J., "if we were to introduce the principle that a man, by ob-

(*u*) *Williams* v. *Banks*, 1 F. & F. 557.

(*x*) *Michell* v. *Williams*, 11 M. & W. 217.

(*y*) Maule, J., *Heslop* v. *Chapman*, 23 Law J., Q. B. 49.

(*z*) *Philips* v. *Naylor*, 4 H. & N. 565; 27 Law J., Exch. 222.

(*a*) *Dubois* v. *Keats*, 11 Ad. & E. 332. *Fitz John* v. *Mackinder*, 30 Law J., C. P. 257.

taining the opinion of a counsel, by applying to a weak man or an ignorant man, may shelter his malice in bringing an unfounded prosecution" (*b*).

"A prosecution," observes Cockburn, C. J., "though in the outset not malicious, may nevertheless become malicious in any of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction (*c*).

In a recent action for a malicious prosecution it appeared that the defendant had sued the plaintiff in the county court, who pleaded a set-off, and the defendant, in order to get rid of the set-off, forged a receipt of the plaintiff's for a sum of money, and swore before the county-court judge that the handwriting to that receipt was the handwriting of the plaintiff. The plaintiff denied it, and the county-court judge, believing the plaintiff to have been guilty of perjury, committed him for trial, and bound over the defendant to prosecute. The defendant proceeded to the assizes, went before the grand jury and procured a bill of indictment to be found against the plaintiff, and stuck to the charge at the trial, and endeavoured to maintain it by perjured evidence, but the plaintiff was acquitted. The plaintiff then brought an action against the defendant for a malicious prosecution, and having satisfied a jury that the defendant preferred the charge with the knowledge of its falsehood, recovered 200*l.*; and it was held that the action was maintainable, because the defendant persisted to the last in the false charge, having no reasonable or probable cause for the charge, but preferring it with knowledge of its falsehood, and endeavouring at the trial to maintain it with further and perjured evidence (*d*). "But for the order of the county-court judge," observes Willes, J., "the action would, beyond all doubt, have been maintainable, and then that order ought not to aid the defendant; first, because it was occasioned by his own contrivance and wrong; and, secondly, because as a judicial act it is void, having been obtained by fraud of the court" (*e*). Although the defendant was compelled to prosecute, there was no compulsion upon him to persist in a false charge. He might have discharged his recognizances by appearing and telling the truth. "It is supposed," observes Lord Denman, "that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify the party, or prevent his subsequent conduct from being malicious." "If an unwilling party," further observes Little-

(*b*) *Hewlett* v. *Cruchley*, 5 Taunt. 283.
(*c*) *Fitz John* v. *Mackinder*, 30 Law J., C. P. 264.
(*d*) Ib. 257.
(*e*) 8 W. R. 341.

dale, J., "were bound over by recognizance to prosecute, the recognizance would furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive" (*f*).

Malicious complaints before magistrates — Maliciously causing a justice's warrant to be issued against the plaintiff.—If a defendant maliciously and without reasonable and probable cause has attended before a magistrate and made a complaint, and induced the magistrate to issue a warrant against the plaintiff, the defendant is responsible in damages in an action for a malicious prosecution. If he goes before a magistrate and states that he has just cause to suspect that the plaintiff has robbed him, and upon that representation a warrant is granted, it does not lie in his mouth to say that the magistrate ought not to have granted the warrant; and if he has knowingly made a false charge, and had no real *bonâ-fide* ground of suspicion, he is answerable for it (*g*). But to show that the defendant was influenced by malice, it must be proved that the charge was wilfully false, or that the statements made by him before the magistrate were untrue to his knowledge, at the time he made them (*h*), or that they were of such a nature that no well-intentioned person would state them, and found a criminal charge upon them, without ascertaining whether they were true or false, the means of inquiry and of ascertaining the truth being within his reach, if he had thought fit to avail himself of them. "A man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as it regards both the accuser and the party accused, whether the charge be made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge; whereas that which rests on suspicion only will be satisfied by circumstances sufficient to induce suspicion on the mind of a cautious person." "This distinction," observes Bayley, J., "between a direct charge and one upon suspicion only is well known. I may know that a person has stolen my property by having seen him commit the act, or by having heard him confess it, and in either of these cases the charge would proceed directly from my own knowledge, but information to a less extent might reasonably create in me a suspicion, and then the charge would proceed in a form less direct" (*i*).

It has been held, that if a party goes and lays his complaint of the loss of his property before a magistrate, and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this

(*f*) *Dubois* v. *Keats*, 11 Ad. & E. 332. *Wyatt* v. *White*, 8 W. R. 307.
(*g*) *Elsee* v. *Smith*, 1 D. & R. 105.
(*h*) *Cohen* v. *Morgan*, 6 D. & R. 8.
(*i*) *Davis* v. *Noake*, 6 M. & S. 32.

information. If, therefore, the magistrate, acting upon the statement or deposition *bonâ fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in so doing forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining party, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous judgment of the magistrate, and the acts consequent thereupon (*k*). But if there is no reasonable or probable cause for a charge of felony, and a charge of felony is made, the party preferring the charge will be responsible for it, though he acted under the advice of the magistrate, and preferred the charge at his suggestion.

It is very often a very doubtful question whether a particular offence amounts to a felony, and it oftens depends upon the fact of the prisoner's having acted with conscious dishonesty, or under a notion of right on his part. But "some persons suppose that no man can lay his hands on goods that do not belong to him without being guilty of felony. If you could get at the bottom of a man's mind, he might say he was justified, because the plaintiff had no right to do it, no matter how honest his intention; but if that is his opinion, it is a blunder on his part, and one of those blunders," observes Bramwell, B., "for which a man who commits it should be punished, as it is very likely that the person charged with felony through the blunder will, as long as he lives, be sometimes asked whether he had not been had up before the magistrate for felony" (*l*).

It is not necessary, in order to maintain an action against a person for having made a false and unfounded charge of felony against another before a magistrate, to show that the charge was taken down in writing, and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate with the view of inducing him to entertain it as a charge of felony (*m*).

Continuance by defendant of proceedings commenced without his knowledge.—When the proceedings have not been commenced by the defendant, but have only been continued by him, his responsibility commences at the point at which he becomes cognisant of the proceedings. And there is a material distinction between instituting a prosecution and merely attending the hearing upon a proceeding already commenced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible for the motives or actions of the person who instituted it, although that person may be an agent of the defendant (*n*).

(*k*) *Leigh* v. *Webb*, 3 Esp. 165. *Wyatt* v. *White*, 5 H. & N. 371; 29 Law J., Exch. 193; ante, pp. 504–506.

(*l*) *Huntley* v. *Simson*, 27 Law J., Exch. 137; 2 H. & N. 600.

(*m*) *Clarke* v. *Postan*, 6 C. & P. 423.

(*n*) *Weston* v. *Beeman*, 27 Law J., Exch. 57.

Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff.—A conviction of the plaintiff by a magistrate, so long as it has not been reversed on appeal, affords a conclusive answer to the charge that the complaint or information which led to it was founded in malice, and was preferred without reasonable or probable cause (*o*).

Maliciously causing a search-warrant to issue.—If a person, without reasonable and probable cause, and from malicious or corrupt motives, causes a search-warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant; but if a party goes before a magistrate, and lays before him fair grounds of suspicion for the magistrate to exercise his judgment upon them, and the magistrate thinks fit, in the exercise of the functions of his office, to issue the warrant, the person so attending before the magistrate is not then responsible for the issue of the warrant, unless he has knowingly or recklessly, and without due inquiry, sworn to what was false (*p*).

Malicious prosecution by court-martial.—An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the public service (*q*).

Malicious assertion of a legal right.—The malicious assertion of a legal right is not actionable. "Let a prosecution be never so maliciously carried on, yet if there be probable cause or ground for it, no action for a malicious prosecution will lie" (*r*). No man can be sued for the exercise of his legal right to issue execution upon a judgment, though it be averred that he acted maliciously, and without reasonable and probable cause (*s*).

Malicious and unfounded actions.—If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. Thus, if one man slanders another in an action in a proper court no action will lie for it (*t*). There is a great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action he may

(*o*) *Mellor* v. *Baddeley*, 2 Cr. & M. 678; post, ch. 15.

(*p*) *Cooper* v. *Booth*, 3 Esp. 144; cited 1 T. R. 535. *Philips* v. *Naylor*, 4 H. & N. 565; 27 Law J., Exch. 222; 28 Law J., Exch. 225.

(*q*) *Johnstone* v. *Sutton*, 1 T. R. 548. *Sutton* v. *Johnstone*, 1 Bro. P. C. 76. *Floyd* v. *Barker*, 12 Rep. 23.

(*r*) Anon. 6 Mod. 73.

(*s*) *Roret* v. *Lewis*, 5 D. & L. 373. *Magnay* v. *Burt*, 5 Q. B. 394.

(*t*) *Beauchamp* v. *Croft*, Keilw. 26.

sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious, and frivolous, and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. But if A sues an action against B for mere vexation in some cases upon particular damage, B may have an action, but it is not enough to say that A sued him *falso et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious (*u*).

Maliciously putting the process of the law in motion in the name of a pauper or insolvent.—No action will lie for improperly promoting a civil action in the name of a third person, unless it was alleged and proved to have been done maliciously, and without reasonable or probable cause (*x*); but if there be malice and want of reasonable or probable cause the action will lie, provided there be also legal damage (*y*). If the plaintiff in an action charges the defendant with having maliciously and without any reasonable or probable cause, commenced and prosecuted an action against him in the name of a third person for his (the defendant's) own benefit, whereby the plaintiff has sustained damage, and it appears that the party so wrongfully put forward by the defendant was a person in solvent circumstances, the action will be defeated, inasmuch as the award of costs upon the failure of that action would, in contemplation of law, have been a full compensation for the unjust vexation caused by the bringing of the action, and no damage would be deemed to have been sustained; but if it appears that in the previous action there was judgment of non-suit, with an award of costs, and that the plaintiff was a pauper, or an insolvent, and could pay no costs, and that the defendant knew of the insolvency of the plaintiff at the time he induced the latter to bring the action, and had himself no interest in the subject-matter of the suit, there would appear to be a good ground of action (*z*).

Maliciously issuing execution for a larger sum than is due upon a judgment.—Process of execution on a judgment for the purpose of obtaining the sum recorded is *primâ facie* lawful, and the judgment creditor cannot be rendered responsible in damages for issuing execution for more than is due upon the judgment, unless some actual damage can be shown to have been sustained by the plaintiff therefrom. It is not enough for the

(*u*) *Savile* v. *Roberts*, 1 Ld. Raym. 374; 1 Salk. 13.

(*x*) *Flight* v. *Leman*, 4 Q. B. 883.

(*y*) Williams, J., 11 C. B. 730; 1 Roll. Abr. ACTION SUR CASE, H. pl. 1, p. 101.

(*z*) *Cotterell* v. *Jones*, 11 C. B. 728, 730; 21 Law J., C. P. 3. *Atwood* v. *Monger*, Styles, 378. *Waterer* v. *Freeman*, Hob. 266. *Savile* v. *Roberts*, 1 Ld. Raym. 378; 12 Mod. 208. *Pechell* v. *Watson*, 8 M. & W. 691.

plaintiff to show that he was arrested and kept in custody for a greater amount than was due upon the judgment. He must also prove that by reason of the arrest and detention for the larger sum his imprisonment was prolonged, or the expense of obtaining his discharge increased. His remedy, where the thing has been done inadvertently without malice, is to apply to the court, or a judge, that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. "But it would not be creditable to our jurisprudence," observes Lord Campbell, "if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor. The court or judge to whom summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, although by the excess the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances" (*a*). An action therefore is maintainable against a judgment creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.*, issued on such judgment to levy a larger sum than was due, and causing the debtor to be arrested thereunder, and it is not necessary for the plaintiff before bringing the action to obtain his discharge from custody by order of the court or a judge (*b*).

Maliciously causing an extent to issue.—If a defendant, from feelings of ill-will, and with a view to annoy and injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the crown, under the pretence that the debt is in danger of being lost to the crown, when he knows it not to be in danger, or has no reasonable or probable cause for believing it to be in danger, he will be responsible in damages in an action for a malicious prosecution. Such a proceeding is calculated to affect the plaintiff's credit, and bring demands upon him, and be productive of injurious and even ruinous consequences to him. In the action for the malicious prosecution, the law requires that the writ of extent should be traced to its close, and that may be done by showing it to be discharged by the court, though upon an arrangement, and by consent (*c*).

Malicious proceedings in bankruptcy.—An action for a malicious prosecution will lie against persons who petition for an adjudication in bankruptcy, without reasonable or probable cause, and knowingly and wilfully, or recklessly, swear to depositions false in fact (*d*). In order to

(*a*) *Churchill* v. *Siggers*, 3 Ell. & Bl. 938; 23 Law J., Q. B. 308. *Jenings* v. *Florence*, 2 C. B. 467; 26 ib. C. P. 277. *Wentworth* v. *Bullen*, 9 B. & C. 849.

(*b*) *Gilding* v. *Eyre*, 31 Law J., C. P. 174.

(*c*) *Craig* v. *Hasell*, 4 Q. B. 492.

(*d*) *Farley* v. *Danks*, 4 Ell. & Bl. 499. *Brown* v. *Chapman*, 1 W. Bl. 427.

prove a want of reasonable or probable cause, the proceedings must be superseded or set aside before the commencement of the action, for the very existence of a commission of bankruptcy has been held to be evidence of probable cause (*e*). The mere fact of the proceedings having been superseded or set aside, does not of itself establish the fact of the want of probable cause for them, and the plaintiff must give some *primâ facie* evidence of want of probable cause, in order to put the defendant upon proof of the existence of probable cause (*f*).

Malicious abuse of legal process.—Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. Thus, where the defendant having instituted legal proceedings against the plaintiff, and caused a writ to be issued against him, employed the officer charged with the execution of the process to do a specific thing that he was not warranted by the writ to do, viz. to use it as a means of compelling the plaintiff to give up a ship's register, it was held that the defendant was responsible in damages to the plaintiff for causing him to be arrested and detained until he had given up the register, and for the injury he had sustained in being deprived of the register which he had given up to obtain his release from custody. And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action, or whether the suit was legally terminated or not (*g*).

Malicious detention of judgment debtors after tender of the debt and costs.—The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), authorises the sheriff, gaoler, or person in whose custody a prisoner may be, under a writ of *ca. sa.* to discharge such prisoner on receiving an order in writing from the attorney in the cause; but the attorney is not to give the discharge without the consent of his client, nor is the sheriff or gaoler, or person having the prisoner in custody, to liberate him, if the judgment creditor gives him notice not to do it. If, therefore, the latter, after tender of the amount of the judgment debt and costs, refuses to consent to the discharge of the prisoner, or interferes to prevent his liberation, he will be guilty of a wrongful act, and may render himself liable to an action for maliciously refusing to discharge the prisoner, and detaining him unlawfully in custody (*h*).

Malicious arrest.—The very important alteration in the law effected by the statute 1 & 2 Vict. c. 110, has materially altered the nature of

(*e*) *Whitworth* v. *Hall*, 2 B. & Ad. 698.
(*f*) *Hay* v. *Weakley*, 5 C. & P. 361. *Cotton* v. *James*, 1 B. & Ad. 134.
(*g*) *Grainger* v. *Hill*, 5 Sc. 580; 4 Bing. N. C. 212. *Heywood* v. *Collinge*, 9 Ad. & E. 274.
(*h*) *Crozer* v. *Pilling*, 4 B. & C. 26.

the action for a malicious arrest. By the first section of that statute arrest on mesne process is abolished; but by section 3 it is enacted, that if a plaintiff shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge that he has a cause of action against the defendant to the amount of 20*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge, by special order, to direct that the defendant may be held to bail for such sums as the judge may think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for the plaintiff to make the arrest within the time limited by the order. The defendant when arrested is to remain in custody (s. 4) until he has given bail, or made a deposit to secure the debt and costs. The order for the arrest may be made (s. 5) at any stage of the proceedings, and the party arrested is enabled (s. 6) to apply to a judge or to the court for a rule or order upon the plaintiff, to show cause why he should not be discharged out of custody, and the judge or court may make such order thereon as may seem just.

The foundation therefore on which the liability of a person for a malicious arrest must now rest is, that the party obtaining the order or authority from a judge for the arrest has imposed on the latter by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit fairly stating the facts, the party succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a capias to arrest him, he is not liable to an action though the defendant had no such intention.

The party arrested has the power of making an application to a judge or the court praying to be discharged out of custody, and the discharge will be granted as a matter of course if such party succeeds in satisfying the judge or court that he has not, nor ever had, the intention imputed to him; but the discharge affords no ground of action against the party procuring the arrest, if the original order for the arrest was fairly obtained (*i*). Where, however, the facts are not truly stated in the affidavit, and the court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit, or procuring the order for the arrest, was guilty of falsehood in the affidavit, or of culpable negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages (*k*).

(*i*) *Daniels* v. *Fielding*, 16 M. & W. 207.

(*k*) *Gibbons* v. *Alison*, 3 C. B. 185 *Ross* v. *Norman*, 5 Exch. 359.

Any statements or declarations made by the defendant tending to show that he had no reasonable or probable cause for believing, and did not believe, that the plaintiff was about to quit England, is of course evidence against him to show that he was actuated by malicious motives in procuring the order for the arrest (*l*).

The arrest by a sheriff under a writ from any of the Queen's courts of a person privileged from arrest by reason of attendance as a witness under the process of another court, does not form the ground of any action at law, though it is alleged to have been done maliciously (*m*).

What amounts to a malicious arrest—Proof of actual custody.—Where the party submits to the process, or to the commands of an officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary, as we have seen (ante, p. 487), to constitute an arrest. Where the defendant for purposes of extortion had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer finding his way to the plaintiff's sick-bed produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff yielded to the pressure and gave up the property, it was held that these facts amounted in judgment of law to an arrest (*n*).

SECTION II.

OF ACTIONS FOR MALICIOUS ARREST AND MALICIOUS PROSECUTION.

Actions for a malicious arrest are maintainable, as we have seen, whenever a party has obtained an order or authority from a judge to make an arrest, by imposing some false statement upon the judge knowingly and designedly, and for the purpose of obtaining some undue advantage, or by stating certain facts as being true within his knowledge, when he knew nothing about them, or his belief in the truth of a particular statement, when he had no reasonable or probable cause for his belief (post, ch. 18. s. 1). We have seen, also, that an action is maintainable by a judgment debtor who has been arrested and imprisoned for more than is due upon the judgment, if his imprisonment has thereby been prolonged, or the expense of his obtaining his discharge has been increased, and actual damage can be proved to have been sustained by him from the commission

(*l*) *Petrie* v. *Lamont*, 4 Sc. N. R. 339. (*m*) *Magnay* v. *Burt*, 5 Q. B. 381.
(*n*) *Grainger* v. *Hill*, 5 Sc. 580.

of the wrongful act (ante, p. 531). "It is obvious," observes Lord Campbell, "to common sense, that a debtor may be grievously damnified by reason of the execution under a *ca. sa.* being for the full amount of the sum recovered by the judgment, where only a very small sum is due; his imprisonment is thereby likely to be greatly prolonged, and though, by the mere force of the writ, the sheriff is not authorised to receive the money, to levy which is the great object of the execution, it is well known, and may be capable of proof, that in practice the attorney for the judgment creditor may name a special bailiff, to whom the warrant is to be directed, and that he is authorised to discharge the debtor on payment of the sum endorsed on the warrant, to be levied with poundage and other expenses. At any rate, it is quite clear that, by a declaration on the warrant that the whole sum recovered is to be levied, although the greatest part of it has been paid, the debtor must be greatly embarrassed and delayed in raising the small balance remaining due, and in applying for his discharge (*o*). We think, therefore, that an action is maintainable whenever execution has been sued, and the person or goods of the judgment debtor have been taken in execution for a larger sum than remained due upon the judgment, this being shown to be done maliciously, and without reasonable and probable cause, and to have produced actual damage to the judgment debtor."

Pendency of a rule for a criminal information against the defendant.— The mere fact of a criminal information being pending against the defendant on the prosecution of the plaintiff, for the same subject-matter, is no ground for staying the proceedings in the action; but if the plaintiff has resorted to his private remedy, by way of action, the court will not in general allow him to proceed with the criminal information until the action has been discontinued (*p*).

Parties to be made defendants.—It is immaterial whether the defendant alone makes the charge, or whether he stirs up and procures another to do it. In either case he is liable in damages (*q*). If, for the gratification of his malice, a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done under it; and if the agent have no cause for the proceeding, the principal is responsible, for it is his duty to inquire whether the proceeding be well founded or not. If, as against the agent, there was an absence of reasonable and probable cause for the prosecution, that is sufficient as against the principal, by whose authority and direction the agent acted (*r*). But if the agent institutes the proceeding of his own head, and without

(*o*) *Churchill* v. *Siggers*, 3 Ell. & Bl. 929; 23 Law J., Q. B. 311.
(*p*) *Caddy* v. *Barlow*, 1 M. & R. 278. *Rex* v. *Sparrow*, 2 T. R. 198.
(*q*) *Savile* v. *Roberts*, 1 Ld. Raym. 377.
(*r*) *Michell* v. *Williams*, 11 M. & W. 213.

the instigation or direction of the principal, the latter will not be responsible for the unauthorised proceedings of his agent, unless he adopts them and continues them with knowledge of all the circumstances. When proceedings have been commenced by an agent without the knowledge of the principal, the responsibility of the latter commences at the point at which he becomes cognisant of the proceedings (*s*).

If an attorney maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorised the proceeding, will be responsible in damages (*t*). If, in an action for a malicious prosecution against A and B, supported by proof that both A and B entered into a joint recognizance to prosecute and give evidence, it appear that A only employed the attorney, and that B attended before the magistrate and the grand jury at the request of the attorney, B will be entitled to an acquittal (*u*).

A railway company is not liable for a malicious prosecution instituted by their servant without the knowledge or direction of the company, and a doubt has been thrown out as to whether a corporation can be actuated by that sort of malice that is essential to the maintenance of an action for a malicious prosecution (*x*).

Declarations for a malicious arrest under a judge's order should show that the defendant went before one of the judges of the superior courts, and falsely and maliciously, and without any reasonable or probable cause, represented and pretended to the judge that the defendant, or some third party, had a cause of action against the plaintiff for a sum exceeding 20*l*., and that there was probable cause for believing that the plaintiff was about to quit England; and, by means of such false and malicious representation, caused and procured the judge to make a special order, directing that the plaintiff might be held to bail, and then maliciously, and without any reasonable and probable cause, sued out a writ of capias, and caused the plaintiff to be arrested and imprisoned under the said writ (*y*).

Declarations for maliciously arresting the plaintiff on a ca. sa. for more than was due upon the judgment must show that some actual damage has been sustained by the plaintiff from the wrong done. It is not enough to allege that the judgment had been partly satisfied, and that execution was sued out, and the plaintiff arrested and imprisoned for a larger sum than remained due upon the judgment. The declaration usually sets forth the

(*s*) *Weston* v. *Beeman*, 27 Law J., Exch. 57.
(*t*) *Stockley* v. *Hornidge*, 8 C. & P. 16.
(*u*) *Eager* v. *Dyott*, 5 C. & P. 4.
(*x*) *Stevens* v. *Mid. Rail. Co.*, 10 Exch. 352; 23 Law J., Exch. 328.
(*y*) *Petrie* v. *Lamont*, 4 Sc. N. R. 335; 3 M. & Gr. 702. *Daniels* v. *Fielding*, 16 M. & W. 206. *Ross* v. *Norman*, 5 Exch. 359.

recovery of judgment by the defendant in a certain action, in which the defendant was the plaintiff and the plaintiff was the defendant, the receipt by the defendant of a certain sum in part payment and satisfaction of the judgment, and that the defendant nevertheless wrongfully and maliciously, and without any reasonable or probable cause, sued out and endorsed a writ of *ca. sa.* for the whole of the debt, and delivered the writ so endorsed to the sheriff, and caused the plaintiff to be imprisoned under the said writ to satisfy the defendant the whole of the debt, whereas at the time of the suing out and endorsing the writ a certain specified smaller sum, and no more, was due from the plaintiff upon the judgment; and that the plaintiff, after he had been taken and imprisoned, and long before his discharge from custody, was able and willing, and offered to pay, and was afterwards discharged from imprisonment on paying, the specified smaller sum and no more, and that the plaintiff, by reason of the premises, was prevented from attending to his business, was injured in his credit, and was put to and incurred divers costs and expenses for his maintenance during the said detention, and in obtaining his discharge (*z*).

In an action for maliciously and without reasonable and probable cause indorsing a writ of *ca. sa.* with directions to levy a larger sum than was due upon the judgment, and causing the plaintiff to be arrested thereunder, it is not necessary to show on the face of the declaration that the plaintiff had been discharged from custody by order of the court or a judge, for by yielding to the extortion and paying the money he does not deprive himself of his legal remedy for the wrong done to him (*a*).

Declarations for a malicious prosecution usually set forth that the defendant, at a specified time and place, appeared before one of Her Majesty's justices of the peace then acting in and for a certain specified locality, and falsely and maliciously, and without any reasonable and probable cause, charged the plaintiff with a felony or a misdemeanour, as the case may be, specifying the nature and substance of the charge as laid in the information before the justice, and averring that the defendant thereby caused the justice to grant his warrant for the apprehension of the plaintiff, and bringing him before the justice, or some other justice, to be dealt with according to law; and that the defendant, under and by virtue of the warrant, procured the arrest and imprisonment of the plaintiff for a certain specified period; and then caused him to be conveyed in custody before certain named justices, then acting as justices in and for a certain specified locality; and then maliciously, and without any reasonable and probable cause, persisted in his false charge and complaint, and caused the justices to commit the plaintiff to prison, to take his trial

(*z*) *Jenings* v. *Florence*, 2 C. B., N. S. 467; 26 Law J., C. P. 277. *Saxon* v. *Castle*, 6 Ad. & E. 659.

(*a*) *Gilding* v. *Eyre*, 31 Law J., C. P. 174.

upon the charge at the then next general quarter sessions of the peace, to be holden, &c.; and then procured the plaintiff to be imprisoned upon the charge until he was discharged as thereinafter mentioned; and that the defendant, at the general quarter sessions of the peace holden, &c., falsely and maliciously, and without any reasonable and probable cause, caused the plaintiff to be indicted upon the false, malicious, and pretended charge, and that the plaintiff was in due form of law tried upon the indictment, and was acquitted and discharged out of custody; setting forth the nature and extent of the damages that have been sustained by the plaintiff, and the charges and expenses incurred by him in defending himself against the prosecution.

If there be any special damage it should be stated, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury (*b*). The declaration must aver the termination of the prosecution, and set forth the means by which it was ended; otherwise the plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution (*c*).

Of the plea of NOT GUILTY *in actions for a malicious arrest and malicious prosecution.*—The plea of Not guilty in actions for a malicious arrest, malicious prosecution, and maliciously suing out a fiat in bankruptcy, puts in issue the fact of the arrest or the prosecution by or through the instrumentality of the defendant, the question of malice, and of the existence of reasonable and probable cause (*d*) for the prosecution, but not the fact of the discontinuance or termination of the proceedings. If, therefore, the declaration avers the discontinuance of the prosecution, or the termination of the proceedings by a dismissal of the complaint, charge, or petition, these material allegations must be specially traversed, in order to put the plaintiff upon proof of them (*e*).

Pleas of justification.—If the defendant, instead of relying on the plea of Not guilty, elects to bring the facts before the court in a plea of justification, he must allege as a ground of defence that the facts and circumstances which he relies upon as showing reasonable and probable cause for the institution of the prosecution, were known to him at the time the charge was made, and formed the reason and inducement for his putting the law in motion (*f*).

Evidence at the trial—Proof on the part of the plaintiff—Malicious arrest.—In order to maintain an action against a defendant for a malicious arrest under a judge's order, the plaintiff must, under the plea of Not guilty, prove, as we have seen, that the defendant procured the order by

(*b*) Post, ch. 22, s. 1.
(*c*) *Fisher* v. *Bristow*, 1 Doug. 215. *Arundell* v. *Tregono*, Yelv. 116.
(*d*) *Cotton* v. *Browne*, 3 Ad. & E. 312.
(*e*) *Watkins* v. *Lee*, 5 M. & W. 270. *Atkinson* v. *Raleigh*, 3 Q. B. 85. *Haddrick* v. *Heslop*, 12 ib. 275.
(*f*) *Delegal* v. *Highley*, 5 Sc. 169; 3 Bing. N. C. 950.

imposing upon the judge some false statement, or swearing to his belief in a particular state of facts, without having any reasonable or probable cause for his belief (ante, pp. 532, 533). The plaintiff, therefore, must be prepared to prove the affidavit made by the defendant before the judge by production of the original or an examined or office copy (*g*), and must show that the defendant made the affidavit, or used it (*h*). The judge's order for holding the plaintiff to bail should be proved by production of the original order, purporting to be signed by one of the judges of the superior courts (*i*). The arrest of the plaintiff by virtue of the order, at the instance of the defendant, or by his procurement, may be established by the defendant's declarations and conduct in the matter of the arrest, and the surrounding circumstances of the case, as well as by production of the writ and warrant.

Where the plaintiff put in evidence the judge's order, and a writ of capias which had been issued thereon and lodged with the sheriff, but the capias was not shown to have been returned, neither was any warrant produced, but it was proved that on the defendant being told that the plaintiff was in custody he said, as he had got him fast he would punish him, and further, that his attorney attended before the judge to oppose the plaintiff's discharge, it was held that there was sufficient proof against the defendant, without the production and proof of any warrant (*k*). If the plaintiff has not by his conduct and declarations admitted that the arrest was made by his orders and directions, the writ under which the arrest was effected may be proved by production of the original writ, sealed with the seal of the court; or if it has been returned and become matter of record, it may be proved by a certified or examined copy. The warrant from the sheriff to his officer may be proved in like manner (*l*), and the fact of the arrest may be established by the evidence of the officer who effected it, and by the plaintiff's own testimony in the matter.

An arrest may be established, as we have seen, by proof that the plaintiff voluntarily submitted to the process, or to the commands of the officer, and that restraint was put upon him. It is not necessary to show any actual contact, or that a hand was laid upon him (ante, p. 487).

In actions for maliciously arresting the plaintiff on a *ca. sa.* for more than is due, it is not competent for the plaintiff at the trial to obtain a verdict, by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly indorsed on the warrant; it must be proved, as we have seen (ante, pp. 531, 535), that by reason of

(*g*) *Arundell* v. *White*, 14 East, 224. *Crook* v. *Dowling*, 3 Doug. 75. *Casburn* v. *Reid*, 2 Moore, 60.

(*h*) *Rees* v. *Bowen*, McClel. & Y. 392.

(*i*) 8 & 9 Vict. c. 113, s. 2, post, ch. 21, s. 1.

(*k*) *Petrie* v. *Lamont*, 3 M. & Gr. 707.

(*l*) Post, ch. 21, s. 1.

the arrest and detention for the larger sum the debtor's imprisonment was prolonged, or the expense of obtaining his discharge increased (*m*).

Proof of malicious informations and complaints before magistrates.—The statute 11 & 12 Vict. c. 42, s. 17, requires all magistrates before whom any person shall appear, or be brought charged with any indictable offence, to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and put the same into writing, and cause them to be read over to, and signed by, the witnesses, before they commit the accused person for trial, or admit him to bail. These depositions are afterwards (s. 20) to be delivered to the proper officer of the court in which the person committed or bailed is to be tried, and the latter is (s. 27) to be furnished with a copy thereof on application to the officer or person having the custody of the same.

Where the charge or complaint, or the examination, is by law required to be taken down in writing, it is always to be presumed that this was done, although the party was discharged on the ground that no case was made out against him. Unless, therefore, positive evidence be given that the examinations were not taken down, oral evidence cannot be given of what took place before magistrates (*n*), for where matters are required to be reduced into writing by statute for the purpose of evidence, the writing is considered to be the best evidence, and must be produced, unless it can be shown to have been lost or destroyed (post, ch. 21). If it be proved that no depositions were taken, then oral evidence of what took place before magistrates is admissible (*o*).

In order, therefore, to prove the proceedings before magistrates, it is in general necessary to serve the magistrate's clerk with a subpœna *duces tecum*, if the proceedings are in his custody; but if they have been returned to the clerk of the peace, or his deputy, or to the clerk of the arraigns, then the officer who has the custody of them is the proper person to be summoned to produce them. If the officer in whose custody they ought to be, if they exist, has searched for them and cannot find them, secondary evidence may be given of their contents (*p*). The oath and handwriting of the defendant should be proved, and the issue of the warrant on the strength of the information. If the charge was dismissed and was not taken down in writing, or if it was of such a nature, or made under such circumstances, that there was no obligation imposed by law upon the justices to take it down in writing, the nature of it may be proved by any person who was present and heard the charge made (*q*).

In all actions against parties for going before justices of the peace, and

(*m*) *Jennings* v. *Florence*, 2 C. B., N. S. 467; 26 Law J., C. P. 277. *Churchill* v. *Siggers*, 23 ib. Q. B. 312; 3 Ell. & Bl. 929.

(*n*) *Parsons* v. *Brown*, 3 C. & K. 296.

(*o*) *Jeans* v. *Wheedon*, 2 Mood. & Rob. 486.

(*p*) *Freeman* v. *Arkell*, 2 B. & C. 494.

(*q*) *Clarke* v. *Postan*, 6 C. & P. 423.

lodging a complaint or information against the plaintiff, and obtaining a warrant for his arrest, and causing him to be arrested, it must be proved that the complaint and wrongful acts of the defendant in the matter were done maliciously, and without reasonable and probable cause. If it appears that the defendant laid his case before a magistrate, that the magistrate issued a summons, which was served on the plaintiff, requiring him to appear and answer the complaint, and that the plaintiff chose to take no notice of the summons, whereupon the magistrate directed a warrant to issue, upon which the plaintiff was arrested, the defendant will not be responsible for the arrest, as it was caused by his own negligence and misconduct, rather than by the complaint made against him by the defendant (*r*).

Proof of malicious criminal prosecutions.—To support an action for a malicious and unfounded criminal prosecution, the plaintiff must prove the fact of the prosecution, that it was instigated by the defendant (ante, p. 535), or that the defendant was the prosecutor; that the charge was unfounded, and made without reasonable and probable cause (ante, p. 522); that there was malice on the part of the defendant (ante, p. 523); that the prosecution terminated in the plaintiff's favour (ante, p. 538); and that injury and expense resulted to the plaintiff from the proceedings. If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted (*s*). The question whether there was or was not probable cause for some parts of the charge would affect the amount of the damages recoverable, but not the plaintiff's right to a verdict (*t*).

Proof by certified copy of the record of the prosecution and acquittal.—The statute 14 & 15 Vict. c. 99, enacts (s. 13), that in order to prove the trial and acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the trial and acquittal, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where the acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, and acquittal, omitting the formal parts thereof (*u*). It has been declared by Willes, C. J., that "every prisoner upon his acquittal has an undoubted right and title to a copy of the record of such acquittal, for any use he may think

(*r*) *Philips* v. *Naylor*, 4 H. & N. 615; 27 Law J., Exch. 224; 28 ib. 225; ante, p. 504; post, ch. 14, s. 2.

(*s*) *Reed* v. *Taylor*, 4 Taunt. 617.

(*t*) *Delisser* v. *Towne*, 1 Q. B. 343. *Ellis* v. *Abrahams*, 8 Q. B. 713.

(*u*) Post, ch. 21, s. 1. *Hunter* v. *French*, Willes, 517. *Caddy* v. *Barlow*, 1 M. & R. 277.

fit to make of it, and that, after a demand of it has been made, the proper officer may be punished for refusing to make it out" (*x*).

The fact of the defendant's name being on the back of the bill of indictment does not prove that he was the prosecutor of the indictment, for the name of any person who can give evidence respecting the subject-matter of the indictment may properly be put upon the back of the bill (*y*). But the fact of the defendant's having instituted the prosecution may be proved by showing that he employed an attorney or agent to conduct the proceedings, gave orders and directions concerning them, paid expenses, and personally interfered in getting up the case and preparing evidence (ante, pp. 527–534). The mere fact of a party having attended at the trial and given evidence as a witness, is no proof of his having instituted or instigated the prosecution (*z*). Having proved that the defendant instigated the prosecution, it must then be shown that it was done maliciously, and without reasonable and probable cause. Proof of express malice is, as we have seen, no proof of want of reasonable and probable cause (ante, p. 523). The plaintiff must give general evidence, showing that there was no reasonable ground for the prosecution (*a*).

Proof of malice and of want of reasonable and probable cause.—If the circumstances connected with the prosecution are such that the prosecutor must have known that he had no reasonable ground to go upon, there will, as we have seen, be evidence of malice. His own opinion and belief about the matter may, as we have seen, be proved by his own statement and admission (ante, pp. 524, 525), and conduct in the prosecution. If, with full knowledge of all the facts of the case, he takes no step to put the criminal law in motion until long after the alleged crime or misdemeanour was committed, and then causes the plaintiff to be apprehended and prosecuted, without giving any satisfactory reason for the long delay, it will be a question for the jury whether, when he did at last prosecute, he acted under the *bonâ-fide* belief that the plaintiff was really guilty of the charge he brought against him. If he had no such belief, but acted from vindictive feelings, or from causes foreign to the innocence or guilt of the plaintiff of the offence imputed to him, there will be evidence of malice and of a want of a reasonable and probable cause (ante, p. 525). Scandalous charges and accusations made by the defendant against the plaintiff in connexion with the prosecution are evidence of malice. Where the defendant put an advertisement in the newspapers of the finding of the indictment by the grand jury, the advertisement was held to be admissible in evidence to prove the malice of the defendant, although an

(*x*) *Rex* v. *Brangan*, 1 Leach, C. C. 27. And see the statute, 46 Edw. 2, cited Taylor on Evidence, 1157, n. 4, 2nd edn., and printed in the appendix to the 9th vol. of the Statutes at Large, p. 45, 4to. ed.

(*y*) *Girlington* v. *Pitfield*, 1 Ventr. 47.

(*z*) *Eagar* v. *Dyott*, 5 C. & P. 5.

(*a*) *Incledon* v. *Berry*, 1 Campb. 204, n.

information had been granted for it as a libel, but the jury were directed not to consider it in estimating the damages (*b*).

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alléged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the decision of the judge (*c*). The *bonâ-fide* belief of the defendant in the truth of the charge preferred by him against the plaintiff, and in the plaintiff's guilt, is essential to the establishment of reasonable and probable cause for a criminal prosecution, and it is for the jury to determine what was the plaintiff's belief in the matter, and whether, if he believed the plaintiff to have done what he imputed to him, he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on his belief (*d*). If the want of reasonable and probable cause for the prosecution is so strong and plain as to amount to evidence of malice, that must be shown by the plaintiff. An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust (*e*).

Proof on the part of the defendant.—If the plaintiff makes out a *primâ facie* case of malice, and of want of reasonable and probable cause for the prosecution, the defendant must bring forward circumstances to show that he acted *bonâ fide*, and had reasonable ground for believing that the facts within his knowledge constituted the offence which he charged (*f*). If it should appear from his conduct in the matter that he had no such belief, the plaintiff will, as we have seen, be entitled to a verdict (ante, p. 523). In order to show *bona fides* on the part of the defendant, it is competent to him to prove any communication that may have been made to him prior to the commission of the grievance, to show the impression made on his mind, and the materials he had before him for forming an opinion. If the plaintiff had previously been guilty of felony, and the defendant was present at the trial, or had seen a record of the conviction which induced him to act in the matter of the complaint, these facts are receivable as evidence of *bona fides* (*g*).

It is no answer to an action for a malicious prosecution to show that the indictment preferred by the plaintiff was not sustainable, in point of law, against the defendant, "for a bad indictment serves all the purposes

(*b*) *Chambers* v. *Robinson*, 2 Str. 691.
(*c*) *Busst* v. *Gibbons*, 30 Law J., Exch. 75. *Johnstone* v. *Sutton*, 1 T. R. 545. *Panton* v. *Williams*, 2 Q. B. 193. *James* v. *Phelps*, 11 Ad. & E. 488; Anon. 6 Mod. 73. *Clements* v. *Ohrly*, 2 C. & K. 689. *Mitchell* v. *Jenkins*, 5 B. & Ad. 594.
(*d*) *Douglas* v. *Corbett*, 6 Ell. & Bl. 514. *Dawson* v. *Van Sandau*, 11 W. R. 516.
(*e*) *Purcell* v. *Macnamara*, 1 Campb. 202; 9 East, 363; ante, p. 522.
(*f*) *Weston* v. *Beeman*, 27 Law J., Exch. 57. *Turner* v. *Ambler*, 10 Q. B. 260. *Delegal* v. *Highley*. 5 Sc. 169.
(*g*) *Thomas* v. *Russell*, 9 Exch. 764.

of malice, by putting the party to expense and exposing him, but no purpose of justice in bringing the party to punishment if he were guilty" (*h*). When the plaintiff in his declaration avers that up to the time of the prosecution by the defendant he had borne a good character, and claims damages for injury to his character, it may be shown, on cross-examination of the plaintiff's witnesses, that he was at the time a man of notoriously bad character (*i*). But where the plaintiff does not, in his declaration, expressly claim damages in respect of injury to reputation, general evidence as to the plaintiff's character is inadmissible (*k*). Such evidence affords no proof of probable cause for a prosecution (*l*).

Questions for the jury.—The rule is, that however complicated the facts may be on which the question of reasonable and probable cause may depend, the judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable or probable cause or not (*m*). "There have been some cases," observes Tindal, C. J., "which appear at first sight to have somewhat relaxed the application of the rule, but there has been no real departure from it. In some cases the reasonableness and probability of the ground for the prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these, and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts (*n*), the judge determining as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse."

Of the damages recoverable in actions for a malicious prosecution.—In order to recover damages in an action for a malicious prosecution, the plaintiff must show that he suffered either in person, reputation, or pocket.

(*h*) *Wicks* v. *Fentham*, 4 T. R. 248. *Pippet* v. *Hearn*, 1 D. & R. 271.

(*i*) *Rodriguez* v. *Tadmire*, 2 Esp. 721; post, ch. 17, s. 3.

(*k*) *Downing* v. *Butcher*, 2 Mood. & Rob. 374. *Cornwall* v. *Richardson*, R. & M. 305.

(*l*) *Newsam* v. *Carr*, 2 Stark. 70.

(*m*) *Douglas* v. *Corbett*, 6 Ell. & Bl. 515.

(*n*) *Panton* v. *Williams*, 2 Q. B. 194. *Taylor* v. *Willans*, 2 B. & Ad. 856. *Broad* v. *Ham*, 8 Sc. 48.

If, therefore, an indictment is prepared for a common assault, and is ignored by the grand jury, and the party indicted brings his action for a malicious prosecution, he must give some proof of actual damage (*o*), and must show that he was forced to expend his money in necessary charges to acquit himself of the misdemeanour of which he was accused; for if ignoramus be returned where the indictment neither contains matter of scandal nor cause for imprisonment, or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, &c., an action will lie. "There are," observes Holt, C. J., "three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life, limb, or liberty. 3. The damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused" (*p*).

If two persons are indicted without reasonable and probable cause for a conspiracy, and one employs an attorney to defend them, and pays him the costs of the defence, and both are acquitted, and an action is brought for a malicious prosecution and a verdict is given for the plaintiff, he is entitled to recover the amount of the attorney's bill as part of the damages, unless each had a distinct defence and the cost thereof was severable (*q*). Every expense that the plaintiff has necessarily incurred in order to defend himself from the false and malicious charge brought against him, is recoverable as part of the damages, if the plaintiff has claimed it in his declaration (*r*).

Reluctance of the court to interfere with the province of the jury in assessing the damages.—In an action for a malicious prosecution, where the jury gave the plaintiff 10,000*l.* damages, the court refused a new trial, saying they would not interpose on account of the largeness of the damages, unless they were so flagrantly excessive as to afford internal evidence of prejudice and partiality on the part of the jury; that is, unless they were most outrageously disproportionate either to the wrong received or to the situation and circumstances of either the plaintiff or the defendant (*s*).

(*o*) *Freeman* v. *Arkell*, 3 D. & R. 671. *Byne* v. *Moore*, 5 Taunt. 191.
(*p*) *Savile* v. *Roberts*, 1 Ld. Raym. 378.
(*q*) *Rowlands* v. *Samuel*, 11 Q. B. 41.
(*r*) *Foxall* v. *Barnett*, ante, p. 519.
(*s*) *Leith* v. *Pope*, 2 W. Bl. 1326.

CHAPTER XIV.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS — RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF JUSTICE, AND PARTIES SETTING THEM IN MOTION.

SECTION I.—*Of trespasses committed in the execution of void or irregular legal process.*— Exemption of judges from actions where they had a *primâ facie* jurisdiction — Conditions precedent to the existence of jurisdiction — Orders of commitment — Proceedings against county-court judges to compel them to act — Proceedings of courts-martial —Who are judges and judicial officers —Wrongful delegation of judicial functions — Revision of proceedings of inferior courts.

SECTION II.—*Duties and responsibilities of ministerial officers of courts of justice, and parties setting them in motion.*— Illegal assumption of the judicial office — Neglect of ministerial duties — Duties of the sheriff and his officers in the execution of civil process — Priority of writs of execution — Trespasses by sheriffs and their officers— Breaking open dwelling-houses — Illegality of an arrest or seizure of goods effected through the medium of an act of trespass — When the sheriff becomes a trespasser by remaining an unreasonable time—Seizure of the goods of the wrong party—Interpleader between rival claimants — Claims by landlords on sheriffs for arrears of rent — Sale by sheriffs of goods taken in execution—Wrongful arrests—Incurability of a wrongful imprisonment — Countermand of writs and warrants— Escape, recapture, and discharge of prisoners—Arrest and seizure of goods under void or irregular process—Misrepresentation exonerating the sheriff — False returns to writs — Extortion by sheriffs' officers — Duties and responsibilities of high bailiffs, and bailiffs of the county courts, gaolers, and messengers of the court of bankruptcy and their assistants.

SECTION III.— *Actions against judges, sheriffs, bailiffs, and ministerial officers and their assistants, and parties setting them in motion.*— Notice of action—Staying proceedings in actions against sheriffs, their officers and assistants—Statutory protection to high bailiffs and persons acting in the execution of county-court warrants — Staying proceedings in actions against high bailiffs, &c.— Statutory protection in favour of persons acting in execution of the bankrupt acts — Parties to actions against sheriffs and ministerial officers, and parties acting under warrant of the court of bankruptcy — Pleadings, defences, and evidence — Damages recoverable — Exemplary damages — Treble damages.

SECTION I.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS — RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF COURTS OF JUSTICE, AND PARTIES SETTING THEM IN MOTION.

Exemption of judges from actions in respect of things done in the exercise of their judicial functions.—When the executive power of the sovereign has been delegated to others, to be by them put in force in the form pre-

scribed by law, the power thus conferred is termed an authority in law, and affords a justification for all acts and trespasses committed in the exercise of it, so long as the authority has not been abused or exceeded. Neither the judges in the king's courts nor any judicial officers are liable to answer personally for their judicial acts. An action, therefore, will not lie against a judge for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity (*t*); nor against a grand juryman for wrongfully presenting and finding a bill of indictment; nor against a petty juryman for a wrong verdict; nor against the vice-chancellor of the university for a wrongful imprisonment (*u*); nor against a coroner, who is a judicial officer, for any matter done by him in the exercise of his judicial functions. If, therefore, a coroner thinks that an inquest ought to be conducted in secresy, he has power to exclude all persons not necessarily engaged in the inquiry; and if the exclusion of any particular person appears to him to be necessary or proper, it is for him to decide who is to be excluded. And if a person has by order of the coroner been forcibly turned out of a room when an inquisition was about to be taken, the party so expelled has no right of action against the coroner for an assault (*x*).

The general rule as regards judges and judicial officers is, that if they do any act beyond the limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but if the act done be within the limit of their authority, through an erroneous or mistaken judgment, they are not liable to an action (*y*). A judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him, but if he goes out of his way to make slanderous attacks upon the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible like any other individual for the consequences (*z*).

Where parties are not acting as judges, but have only a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, will not render them answerable in damages, provided they have due legal authority and power to act in the matter. And where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody on whom the duty of obedience attaches is bound to do the act required, and is responsible in damages for the consequences of his disobedience or neglect (*a*).

(*t*) *Hamond* v. *Howell*, 1 Mod. 184; 2 Mod. 219.

(*u*) *Kemp* v. *Neville*, 10 C. B., N. S. 523; 31 Law J., C. P. 158.

(*x*) *Garnett* v. *Ferrand*, 6 B. & C. 611.

(*y*) *Doswell* v. *Impey*, 1 B. & C. 169. *Gahan* v. *Lafflitte*, 5 Moore, P. P. C. 382.

(*z*) *Lewis* v. *Levy*, 27 Law J., Q. B. 289. *M'Gregor* v. *Thwaites*, 3 B. & C. 24; post, ch. 17, s. 1.

(*a*) *Ferguson* v. *Earl Kinnoul*, 9 Cl. & Fin. 290; and see *Pedley* v. *Davis*, post, ch. 15, s. 1.

This freedom from action and suit is given to judges, not so much for their own sake as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes Lord Tenterden, "ought to be."

Conditions precedent to the existence of jurisdiction on the part of a judge.—Every judge of a court of inferior jurisdiction must have before him some cause of action, charge, or complaint, into which he has by law authority to inquire, or his proceedings will be extra-judicial, and he will be responsible for the injurious consequences that result from them to others. The particulars of a plaintiff's claim, for example, in the county court, served on the defendant with the county-court summons, must disclose some matter of complaint within the jurisdiction of the court; and if they disclose a cause of action over which the court has no jurisdiction, the judge cannot alter the particulars by inserting therein a new cause of action, and proceeding to hear it, for the defendant has never been summoned to answer such new cause of action, and the judge has consequently no power to take cognisance of it, if the defendant objects to his so doing (*b*).

Exemption of judges from actions where they had a primâ facie jurisdiction, and no objection was taken to their jurisdiction.—A judge of a court of record in England with limited jurisdiction is not responsible in damages for the consequences of his acts and proceedings in respect of matters over which he had no jurisdiction, if he had a *primâ facie* jurisdiction in the matter, and had not the knowledge or means of knowledge, of which he ought to have availed himself, of his want of jurisdiction. Thus it has been held, that if one be arrested by a process out of an inferior court for a cause of action which did not arise within their jurisdiction, the party arrested may well maintain an action against the plaintiff who levied the plaint, and should be intended to know where the cause of action arose; but not against the judge or officer who had entered the plaint, or the officer who had executed it, for when it was impossible for them to know that the cause of action did not arise within their jurisdiction, it would not be agreeable to any rules of justice to make them liable to an action; but the proper and just remedy was against the plaintiff (*c*). It has accordingly been held, that the judge of a court of record in a borough is not responsible as a trespasser for the imprisonment of a defendant where he had no means of knowing except through the plaintiff or defandant, and did not know, that the cause of action arose without the limits of the borough (*d*).

Where the facts of the case before a county-court judge, although

(*b*) *Hopper, in re*, 32 Law J., Q. B. 104. *Calder* v. *Halkett*, 3 Moore, P. C. C. 77.
(*c*) *Olliet* v. *Bessey*, 2 W. Jones, 214. *Taafe* v. *Downes*, ib. 36, n.
(*d*) *Gwynn* v. *Poole*, Lutw. App. 1566.

subsequently found to be false, were such as, if true, would have given the judge jurisdiction, the judge was held not to be responsible for his judgment and order in the matter; but where the facts showed that he had no jurisdiction, and the judge mistook the law as applied to those facts, and wrongfully ordered a party to be committed, it was held that he was responsible in damages for the imprisonment (*e*).

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, all the members of the court present, and taking part in the judgment, may render themselves liable to an action (*f*).

A county-court judge is not ousted of his jurisdiction by a notice of a *bonâ-fide* claim of title. It is his duty to inquire into the claim, and determine whether there really is a question of title involved in the issue before him. If, in a controversy between landlord and tenant, it appears that the tenant has been actually turned out of possession by a third party, claiming by title paramount, a question of title arises; but this is not the case if it appears that the tenant voluntarily gave up possession to such third party (*g*).

Orders of commitment by county-court judges.—If a county-court judge makes an illegal order of commitment in respect of a matter over which he has jurisdiction, he is not himself responsible for his erroneous judgment (*h*). But if he had no jurisdiction in the matter, and the order or warrant of commitment is put in force, he is liable to an action for false imprisonment, if the facts depriving him of his jurisdiction were brought to his knowledge. The power of the county-court judge to imprison judgment-debtors has been considerably curtailed by the statute 22 & 23 Vict. c. 57.

Commitments for contempt.—A court of record has power to punish, by commitment for contempt, a libel upon the court, published when the court is not sitting as well as when it is sitting, and the question whether the particular publication be libellous or contemptuous is a question for the court which commits. When the committal is by way of punishment, it ought to be certain as a sentence, and the term of imprisonment should be specified (*i*). The court cannot delegate to a single judge the power of issuing a warrant for the apprehension and committal of the party (*k*). A superior court may adjudge a man to be guilty of a contempt, and may imprison him for a certain time for such contempt, without setting forth on the face of the warrant the grounds upon which its adjudication pro-

(*e*) *Houlden* v. *Smith*, 14 Q. B. 852.
(*f*) *Wingate* v. *Waite*, 6 M. & W. 746.
(*g*) *Emery* v. *Barnett*, 4 C. B., N. S. 431; 27 Law J., C. P. 216.
(*h*) *Hamond* v. *Howell*, 1 Mod. 184.
(*i*) *Crawford's* case, 13 Q. B. 629. *Rex* v. *James*, 5 B. & Ald. 894.
(*k*) *Van Sandau* v. *Turner*, 6 Q. B. 785.

ceeded (*l*). The County Courts Act, 9 & 10 Vict, c. 95, s. 113, gives the judge power to commit for any insults wilfully offered to him or his officers, or for any wilful interruption of the proceedings of the court, or any other misbehaviour in court; and it has been held that the judge has jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehaviour, and that it is unnecessary for the judge to say more in the warrant of commitment than that he had been wilfully insulted (*m*).

Statutory forms of commitment by county-court judges.—The stat. 19 & 20 Vict. c. 108, s. 59, enacts that every warrant of commitment issuing from a county court shall, on whatever day it may issue, bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date, and no longer; but no order for commitment shall be drawn up or served; and that any warrant of commitment in respect of an unsatisfied judgment or order of a county court may be in the form, or to the effect, given in the schedule of the act, and that all such warrants shall be deemed sufficient to justify proceedings under them, without any further statement of facts to show jurisdiction.

Who are judges and judicial officers.—The steward of a court-baron is a judicial officer, and cannot, therefore, be made responsible for the mistakes and irregularities of the bailiffs and ministerial officers of the court (*n*). So also was the sheriff when presiding in the county court as anciently constituted (*o*). The vice-chancellors of the Universities of Oxford and Cambridge are also judges of a court of record, and so are all persons who have power to fine and imprison (*p*).

Commitment by commissioners of bankrupts of a bankrupt, for not fully answering to their satisfaction lawful questions proposed by them to a party whom they have authority to examine, and upon a subject on which they have authority to inquire, are within the limits of their authority, and they are, consequently, not responsible in damages for any such commitment (*q*). Commissioners of the Court of Bankruptcy have all the powers, rights, and privileges of a court of record, and all other rights, incidents, and privileges, as fully as the same are enjoyed by any of the courts of law or judges at Westminster (*r*).

Delegation of judicial functions.—Judicial functions cannot be delegated, and if it has been the practice of a particular court to delegate to its clerk the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of judge is responsible for the orders he gives. If he takes upon himself to issue a warrant, without the order or

(*l*) *Fernandez, ex parte*, 10 C. B., N. S. 25; 30 Law J., C. P. 321.
(*m*) *Levy* v. *Moylan*, 10 C. B. 211.
(*n*) *Holroyd* v. *Breare*, 2 B. & Ald. 473.
(*o*) *Tunno* v. *Morris*, 2 C. M. & R. 298.
(*p*) *Kemp* v. *Neville*, 31 Law J., C. P. 158.
(*q*) *Doswell* v. *Impey*, 1 B. & C. 169, overruling *Miller* v. *Seare*, 2 W. Bl. 1141.
(*r*) 12 & 13 Vict. c. 106, s. 6.

direction of the judge, he is liable for the trespasses occasioned by its execution. Where certain commissioners of a court for the recovery of small debts were empowered by statute to order payment of judgment debts by instalments, and, in case of default in payment of the instalments, the commissioners present in court, at the instance of the plaintiff, and *upon due* PROOF *of the* DEFAULT, were empowered to award execution against the judgment-debtor, with such costs as to them should seem just, and it was shown to be the practice of the court for the commissioners, at the time they gave judgment for the plaintiff, to direct the debt to be paid by monthly instalments or execution to issue, it was held that the commissioners had no power to make such a practice or such an order at the time of the judgment, because, if made then prospectively, it dispensed with that proof of non-payment which the statute required, and with the exercise of any discretion on their part as to the execution or further costs; that the direction, therefore, for issuing execution, engrafted on the original judgment, and made part of it, was not merely irregular, but a nullity; that the clerk had issued the warrant without authority, and was consequently liable for the imprisonment occasioned by its execution (*s*).

Removal of the proceedings of inferior courts for revision by a superior tribunal.—The remedy by certiorari is available in all cases to remove the judgments, orders, and proceedings of courts of inferior jurisdiction, for the purpose of being examined by the Court of Queen's Bench, and quashed on the ground of want of jurisdiction or excess of jurisdiction, although the writ of certiorari is expressly taken away by statute. If it distinctly appears from the proceedings of the inferior court that the court has taken upon itself to decide on a matter over which it had no jurisdiction, the statutory prohibition of a certiorari does not apply, and the inherent jurisdiction of the Court of Queen's Bench is not restrained (*t*). And if there is nothing on the record to show that there was any excess of jurisdiction, the fact may, nevertheless, be established by affidavits (*u*).

The writ of certiorari, moreover, is not taken away by statutory prohibition, when it is moved for on behalf of the crown. Thus the words in the County Courts Act, 9 & 10 Vict. c. 95, s. 90, enacting "that no plaint entered in any court holden under that act shall be removed or removable from the said court into any of Her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed 5*l.*," does not take away the prerogative right of the crown to remove into the Court of Exchequer causes affecting the crown revenue. Therefore, where an officer of the crown distrained some of the sheep of the plaintiff

(*s*) *Andrews* v. *Marris*, 1 Q. B. 3. *Whitelegg* v. *Richards*, 2 B. & C. 45.

(*t*) *Reg.* v. *South Wales Rail. Co.*, 13 Q. B. 993.

(*u*) *Re Penny*, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. *Reg.* v. *Manch. &c. Rail. Co.*, 8 Ad. & E. 417.

damage feasant in a royal forest, and the plaintiff sought to recover in the county court 1*l.* damages from the officer for an illegal distress, the cause was removed into the superior court, notwithstanding the statutory prohibition (*x*).

The validity of a commitment by a judge of an inferior court may be tested by *habeas corpus* (*y*).

Proceedings against county-court judges to compel them to act in particular cases.—The stat. 19 & 20 Vict. c. 108, s. 13, enacts that no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court or judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer, and also the party to be affected by the act, to show cause why such act should not be done; and if, after the service of such rule or summons, good cause shall not be shown, the superior court or judge thereof may, by rule or order, direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same, on pain of attachment; and in any event the superior court, or the judge thereof, may make such order with respect to costs as to such court or judge shall seem fit (*z*).

Proceedings of courts-martial.—Where the civil rights of a person in the military service are affected by the judgment or sentence of a military tribunal, if that military tribunal is exceeding its jurisdiction, or is acting without jurisdiction, the Court of Queen's Bench will interfere to protect the civil rights of the individual; but where the military status of the applicant only is concerned, the court has no jurisdiction in the matter, as that status is a matter depending entirely upon the will and pleasure of the crown (*a*).

SECTION II.

OF THE DUTIES AND RESPONSIBILITIES OF MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Illegal assumption of the judicial office by ministerial officers.—As judicial functions cannot be delegated (ante, p. 551), it follows that if the mere ministerial officer of the court takes upon himself the responsibility of issuing orders purporting on the face of them to be the orders of the court, but which are issued without its authority, and which are con-

(*x*) *Mountjoy* v. *Wood*, 1 H. & N. 58.
(*y*) *Boyce, in re*, 22 Law J., Q. B. 393.
(*z*) *Fulber, ex parte*, 27 Law J., Exch. 453. *Whitehead* v. *Procter*, 3 H. & N. 533.
(*a*) *Mansergh, in re*, 30 Law J., Q. B. 296.

sequently in form only and not in fact the orders of the court, the officer so misconducting himself is responsible for all trespasses that may have been committed in carrying into effect the orders so issued. But if the order has been made in a cause in court over which the court has a general jurisdiction, the mere ministerial officer who receives the warrant or order from the clerk to execute, and has no knowledge that it was issued without the authority of the court, is not responsible for things done under it (*b*), and the clerk of the court, so long as he confines himself to the mere ministerial duties of his office, and does not take upon himself the exercise of the office of judge, is not responsible for things done under the orders that are signed and issued by him in the discharge of the duties of his office, unless there is a total absence of jurisdiction on the part of the judge (*c*).

Neglect of duty by ministerial officers of courts of justice.—Every ministerial officer of a court of justice is liable to an action for neglecting the duties of his office. Thus, an action lies against the chief clerk of a court for not entering a judgment on the roll when it is his duty so to do (*d*). An action also lies against the clerk of the court at the suit of a judgment-creditor for unlawfully, without the sanction or authority of the court, taking upon himself to issue an order, purporting to be the order of the court, for the discharge of the judgment-debtor, whereby the plaintiff lost the fruits of his judgment. It is no part of the duty of the clerk of the county court to prepare notices of judgments or orders of court for the payment of money, and no action, therefore, lies against him for omitting to prepare such a notice, or for negligently preparing it, whereby a party was misled as to the times of payment of certain instalments ordered by the judge to be paid, and had his goods taken in execution (*e*).

Duties and responsibilities of the sheriff and his officers—Execution of writs.—It is the duty of the sheriff, as soon as a writ of execution has been lodged in his hands, to make careful and diligent inquiry concerning the execution-debtor or his property, and to execute the writ without any unnecessary delay. If he refuses to execute a writ when he has the opportunity, and is required to do it, and nothing occurs to prevent him, he will be responsible in damages to the execution-creditor for his negligence (*f*). On receiving a writ of *fi. fa.* he must endeavour to ascertain what goods the execution-debtor possesses within his bailiwick and seize them, and sell them to the best advantage (*g*). If he sells goods for much less than they ought to have been sold for, or does not take due and proper care in selling to the best advantage, or if he seizes or sells

(*b*) *Andrews* v. *Marris*, 1 Q. B. 3.
(*c*) *Dews* v. *Riley*, 11 C. B. 434.
(*d*) *Douglas* v. *Yallop*, 2 Burr. 722.
(*e*) *Robinson* v. *Gell*, 12 C. B. 191.
(*f*) *Mason* v. *Paynter*, 1 Q. B. 981. *Brown* v. *Jarvis*, 1 M. & W. 704.
(*g*) *Pitcher* v. *King*, 5 Q. B. 767.

goods of much greater value than would suffice to satisfy the execution, poundage, and expenses, he will be responsible in damages to the party damnified (*h*). There is no duty or obligation on the part of the judgment-creditor to give the sheriff any information or assistance to enable him to execute the writ (*i*).

The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the crown and the administration of justice if the king's writ remain unexecuted, as appears by statute Westminster 2, c. 39 (*k*). The law is tender also of the liberties and interests of the subject, and requires the presence of the responsible officer to control the execution of the writ. If, therefore, an arrest is made under a *ca. sa.* by a bailiff to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, the arrest is irregular, and the defendant will be entitled to be discharged out of custody, and may maintain an action for wrongful imprisonment against the bailiff and the sheriff, unless the court has imposed upon him terms prohibiting him from bringing an action (*l*). Where a gentleman who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead, and the gentleman was shot by the debtor whilst he was endeavouring to arrest him, it was held to be no murder, as the arrest was illegal, not having been effected by the officer named in the warrant (*m*).

Priority of writs of execution.—The sheriff, as between himself and different execution-creditors, is bound to execute that writ which is first delivered to him to be executed, and is responsible to the first creditor who so delivered his writ if he does not, unless the execution of the writ is countermanded; in which case the writ, whilst the countermand continues, must be considered as not delivered at all to be executed, because the sheriff cannot act upon it. If, after the sheriff has been desired to suspend the execution of a writ, he receives an order to execute it, this order will not relate back, so as to give the execution of the writ any priority over writs which have been placed in the hands of the sheriff during the period of the suspended execution. The countermand of the execution of the writ is equivalent to its withdrawal, and it is not until the sheriff receives notice of withdrawal of the countermand, and an order to proceed, that the writ is considered to have been again delivered to him to be executed (*n*).

(*h*) *Gawler* v. *Chaplin*, 2 Exch. 506. *Mullet* v. *Challis*, 16 Q. B. 239.
(*i*) *Dyke* v. *Duke*, 4 Bing. N. C. 203.
(*k*) *Howden* v. *Standish*, 6 C. B. 520.
(*l*) *Rhodes* v. *Hull*, 26 Law J., Exch. 265. *Gregory* v. *Cotterell*, 5 Ell. & Bl. 571.
(*m*) Kenyon, C. J., *Housin* v. *Barrow*, 6 T. R. 123.
(*n*) *Hunt* v. *Hooper*, 12 M. & W. 672.

Where goods have been seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is bound to seize and sell the goods under a subsequent execution (*o*).

Trespasses by the sheriff and his officers.—The high-sheriff may be responsible for the acts of the under-sheriff in the execution of the duties of his office, as he is the general officer of the sheriff, but the bailiff is not the general officer of the sheriff. The bailiff gives a bond to the sheriff to execute such warrants as shall be directed to him, and when a warrant is granted him he becomes the special officer of the sheriff for the execution of the particular warrant, and the sheriff is responsible for what he does in the execution thereof, but he is not responsible when the act done by the officer is not done in the execution of a warrant (*p*). The liability of the sheriff in case of mistake or misconduct on the part of his officer, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeazance of the officer, it is no answer for him to say that his command was not obeyed: he is still liable, provided the thing done be something which, by the command, or under the authority of the sheriff, the officer was bound to do (*q*). If a sheriff acting under a *fi. fa.* issues his warrant to his officer, directing him to levy a certain sum on the goods and chattels of the debtor in the usual form, and the officer arrests the debtor instead of levying on the goods, the sheriff will be responsible in damages for the mistake, although the sheriff never directed or authorised him to make the arrest (*r*). But if the officer derives his authority for what he does from some third party, and not from the sheriff (*s*), or if he is not acting in the execution of any process directed to him by the sheriff to be executed, the sheriff is no party to his acts, and is not responsible for what he does.

Thus, if an execution-debtor arrested under a *ca. sa.* pays the debt and costs to the sheriff's officer to obtain his discharge, and the sheriff's officer fails to pay over the money to the execution-creditor, in consequence whereof the debtor is a second time arrested under a fresh writ upon the same judgment, the sheriff is not liable to the debtor for the default of his officer in not paying over the money, as it is no part of the duty of the sheriff or his officer to receive the money. Such a transaction is in the nature of a private arrangement between the debtor and the officer, and the debtor must resort to the officer, who is responsible to him for the

(*o*) *Imray* v. *Magnay*, 11 M. & W. 275.

(*p*) Littledale, J., *Crowder* v. *Long*, 8 B. & C. 605. *Drake* v. *Sykes*, 7 T. R. 116.

(*q*) *Smith* v. *Pritchard*, 8 C. B. 588.

(*r*) *Smart* v. *Hutton*, 8 Ad. & E. 568, n. *Raphael* v. *Goodman*, ib. 565. *Gregory* v. *Cotterell*, 5 Ell. & Bl. 586; 25 Law J., Q. B. 38.

(*s*) *Cook* v. *Palmer*, 6 B. & C. 742.

non-payment of the money, like any other person who has received a sum of money to be carried to another, and has made default in so doing (*t*).

Execution of writs by special bailiffs.—And if the sheriff, at the request of the party suing out the writ, or his attorney, appoints a special bailiff for the execution of it, the sheriff is not then liable for the acts of the officer so appointed (*u*). When, however, the execution of the writ is not expressly taken out of the hands of the sheriff, if there is a mere request that a particular officer may be employed in the execution of it, this does not constitute that officer a special bailiff of the party making the request (*x*).

Trespasses in dwelling-houses by sheriffs and their officers under colour of the execution of legal process.—If a sheriff, by lifting the latch of the outer door of a dwelling-house, or opening the outer door in the way in which it is ordinarily opened by persons going into the house, enters the house of the execution-debtor himself for the purpose of arresting him, or taking his goods, he is justified, if he has reasonable ground to believe that he is there, or that his goods are there; but if he enters the house of a stranger to make the arrest or the seizure, he is justified only in the event of his finding the execution-debtor or his goods in the house (*y*). If it turn out that the latter is not in the house, or had no property there, the sheriff is a trespasser (*z*), unless the house was entered in hot pursuit after an escape (post, p. 557). The house in which the execution-debtor resides, *i.e.* where he sleeps, may be considered to be his own house, although he is not the proprietor thereof, but only a lodger or visitor. "I see no difference," observes Lord Loughborough, "between a house of which the execution-debtor is solely possessed, and a house in which he resides by the consent of another" (*a*).

Of the breaking open the outer door of a dwelling-house in the execution of legal process.—In Semayne's case (*b*) it was resolved—"1. That the house of every man is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

"2. That when any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seizin or possession to the demandant or plaintiff, for the words of the writ are 'habere facias seisinam,' or 'possessionem;' and, after judgment, it is not the house in right and judgment of law of the tenant or defendant.

"3. That in all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do

(*t*) *Woods* v. *Finnis*, 7 Exch. 372.
(*u*) *Ford* v. *Leche*, 6 Ad. & E. 706. *Doe* v. *Trye*, 7 Sc. 704; 5 Bing. N. C. 573.
(*x*) *Alderson* v. *Davenport*, 13 M. & W. 42. *Corbet* v. *Brown*, 6 Dowl. 794.
(*y*) *Morrish* v. *Murrey*, 13 M. & W. 57.
(*z*) *Ratcliffe* v. *Burton*, 3 B. & P. 229. *Johnson* v. *Leigh*, 6 Taunt. 245.
(*a*) *Sheers* v. *Brooks*, 2 H. Bl. 122.
(*b*) 5 Co. 91.

other execution of the king's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open the doors.

"4. That in all cases when the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or the goods; but that it is not lawful for the sheriff (after request made to open the door and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject.

"5. That the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house" (*c*).

The principle that every man's house is his castle does not extend to a barn or outhouse, not connected with a dwelling-house. Therefore the sheriff may break open the door of a barn in order to levy an execution (*d*).

If the officer, after he has peaceably obtained entrance through the outer door, and before he can make an actual arrest, is forcibly expelled from the house, and the outer door fastened against him, he may then break open the outer door and make the arrest (*e*). And when he has once lawfully got inside the house, he is justified in breaking open the outer door to get out again, if the door is locked, and there is no one within who will open the door (*f*).

If the window of a house be open, or a pane of glass broken, and the bailiff put his hand in and touch one for whom he has a warrant, he is thereby his prisoner, and the bailiff may break open the door of the house to come at him (*g*), or break through the window (*h*). And if, after the officer has effected an arrest, the debtor breaks loose and escapes into a house, the sheriff, or his officer, may break the house to retake him, whether the house be the debtor's own house or the house of a stranger, provided he has given notice of the object of his coming, and has demanded and been refused admission (*i*).

What amounts to a breaking of the outer door.—If the sheriff, or his officer, opens the outer door of a house by lifting a latch, or drawing back a sliding bar, in the ordinary way in which persons going into the house

(*c*) *Semayne's* case, 1 Smith's L. C. 78.
(*d*) *Penton* v. *Browne*, 1 Sid. 186.
(*e*) *Aga Kurboolie Mahomed*, 4 Moore, P. C. C. 239.
(*f*) *Pugh* v. *Griffith*, 7 Ad. & E. 827.
(*g*) Anon. 7 Mod. 8. *Sandon* v. *Jervis*, 6 W. R. 690; ante, *Arrest*.
(*h*) *Lloyd* v. *Sandilands*, 8 Taunt. 250.
(*i*) Anon. Lofft, 390.

open the door, this is not a breaking of the door. "As to the passage," observes Pollock, C. B., in Comyn's Digest, "EXECUTION," "that the sheriff may not open a latch, there is no reference to any authority in support of it. The cases do not support that proposition" (*k*).

Of the breaking open of inner doors in the execution of a writ.—If the sheriff, or his officer, gains peaceable entrance at the outer door of a dwelling-house, he may break open an inner door of the house, either to seize the person or the goods of the owner of the house, or of a lodger therein (*l*), and having entered at the open outer door of the house, he need not demand to have the inner doors opened to him before he breaks them, in order to take goods under a *fi. fa.* (*m*). Any resistance to the bailiff after he has once entered at the open outer door will be punishable, although the entry may have been obtained by fraud and deceit (*n*).

Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.—If the original entry into a dwelling-house by a sheriff or his officers was unlawful and an act of trespass, their continuance in the house is unlawful, and they cannot avail themselves of an entry or possession unlawfully gained to execute a *ca. sa.* (*o*). If the sheriff, in making his entry, "has been guilty either of a breach of a positive statute, or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal (*p*). And if advantage is taken of the unlawful entry to effect an arrest of a judgment-debtor, the court will order the prisoner to be discharged" (*q*).

To break and enter a man's house for the purpose of executing a *ca. sa.* "is really," observes Parke, B., "not an abuse of the authority of the writ, but it is executing the authority where the sheriff has none; like going out of the jurisdiction to execute the writ. The door being open, is a condition precedent to executing the writ in the dwelling-house" (*r*). As regards the seizure of goods, however, after an unlawful breaking into the house, a different doctrine has prevailed, on the authority of the following case in the Year-book, 18 Edw. 4, 4a:—"Catesby comes to the bar, and asks whether a sheriff and his officers breaking into a dwelling-house to execute a *fi. fa.* do a wrong or not; the judges answer that the defendants may bring trespass against them, notwithstanding the *fi. fa.*, for that will not excuse them for breaking the house, but 'del prisel des biens, tantum.'" "This case," observes Coleridge, J., "is cited in *Semayne's* case (*s*), as establishing that if the

(*k*) *Ryan* v. *Shilcock*, 7 Exch. 77; 21 Law J., Exch. 58.
(*l*) *Lee* v. *Gansell*, 1 Cowp. 1; Lofft, 374.
(*m*) *Hutchison* v. *Birch*, 4 Taunt. 618. *Lloyd* v. *Sandilands*, 2 Moore, 210.
(*n*) *Rex* v. *Backhouse*, Lofft, 61.
(*o*) *Hooper* v. *Lane*, 6 H. L. C. 535.
(*p*) Tindal, C. J., *Newton* v. *Harland*, 1 M. & Gr. 658.
(*q*) *Hodgson* v. *Towning*, 5 Dowl. 410.
(*r*) *Kerbey* v. *Denby*, 1 M. & W. 341.
(*s*) 5 Co. 92a, 92b.

sheriff breaks the dwelling-house by force of a *fi. fa.*, he is a trespasser by the breaking, and yet the execution which he then doth is good. But it may be doubted whether the judges meant anything more in the Year-book than to state generally what a *fi. fa.* authorised a sheriff to do; but assuming that they did, still the dictum there, and that in *Semayne's* case, are both purely extra-judicial" (*t*).

When the sheriff becomes a trespasser by remaining on premises an unreasonable time.—The writ of *fi. fa.* authorises the sheriff, who has entered upon premises for the purpose of making a levy under it, to remain there for such time as is reasonably necessary for the execution of the writ; but if he remains more than a reasonable time he abuses the legal authority conferred upon him by the Queen's writ and becomes a trespasser, and in the position of a man who has walked into another person's house without any authority (ante, p. 221). The reasonableness of the time is a question for the jury (*u*).

Seizure of the goods of the wrong party.—A sheriff or his officer seizing goods under a writ of execution is responsible in damages if he takes the goods of a wrong party. "If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser; for he is obliged at his peril to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property in the goods is vested (*x*), or compel rival claimants to interplead and establish their title" (*y*). Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the son, who suffered judgment by default, and a writ of execution was issued against him, under which the sheriff, by mistake, took the goods of the father, it was held that the sheriff was responsible for the consequences of his mistake (*z*).

The sheriff has no right to seize the goods of a stranger in the possession of the execution-debtor as the ostensible owner (*a*). If a woman, having furniture of her own, cohabits with the execution-debtor, and assumes his name, and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this does not give the sheriff any right to seize it under the execution against him (*b*). And if the man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the sheriff, as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the

(*t*) *Hooper* v. *Lane*, 12 H. L. C. 542.
(*u*) *Ash* v. *Dawnay*, 8 Exch. 243. *Playfair* v. *Musgrove*, 14 M. & W. 239.
(*x*) Bac. Abr. EXECUTION, N. 5. *Roberts* v. *Thomas*, 6 T. R. 88. *Saunderson* v. *Baker*, 3 Wils. 309.
(*y*) Post, s. 3. INTERPLEADER.
(*z*) *Jarmain* v. *Hooper*, 6 M. & Gr. 847; 7 Sc. N. R. 679.
(*a*) *Dawson* v. *Wood*, 3 Taunt. 260.
(*b*) *Edwards* v. *Bridges*, 2 Stark. 396.

goods belonged to the supposed wife before the celebration of the void marriage, the sheriff will be responsible to her in damages for the unlawful seizure (*c*). The acquiescence of the woman was held to be of no moment, the execution being a proceeding *in invitum*, and she having no power to resist, not having discovered the error.

But where the woman takes an active part in misleading the sheriff, and asserts that she is the wife of the execution-debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her representation (*d*). And if the evidence shows that she had given the property to the man with whom she cohabited, and had made him the owner of it, the sheriff will then have a right to seize it (*e*).

As one man's goods cannot be seized by the sheriff to pay another man's debts, it follows that the goods of a testator in the hands of an executor cannot be seized under an execution against the executor to satisfy a judgment-debt due from the executor himself in his own right (*f*); but if a devastavit has been committed by the executor, and the goods have been converted to his own use, the executor cannot take advantage of his own wrong, and justify his own misconduct, by saying that the goods are not his, but his testator's (*g*).

An illegal seizure of goods under void process does not prevent the sheriff from afterwards executing a legal warrant. The subsequent valid seizure is in nowise vitiated by the previous trespass, but a different rule prevails with respect to an illegal arrest (*h*).

When a sheriff has taken possession of goods under a *fi. fa.*, his officer should continue in possession, in order to sustain the seizure against others afterwards coming under legal authority to seize the same goods (*i*).

Seizure by sheriffs and their officers of privileged or protected goods.—An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the commands of a writ, but the party injured must apply to the court for an order upon the sheriff to restore the goods. Thus, if the sheriff seizes the bedding and wearing apparel of an insolvent petitioner, who has obtained an order for protection from process, the remedy is by application to the court for an order upon the sheriff to withdraw, and not by action (*k*).

Power of the sheriff to compel rival claimants to interplead and establish their title before he levies.—By 1 & 2 Wm. 4, c. 58, s. 6, reciting that

(*c*) *Glasspoole* v. *Young*, 9 B. & C. 701.
(*d*) *Langford* v. *Foot*, 2 M. & Sc. 349.
(*e*) *Edwards* v. *Farebrother*, 2 M. & P. 293. As to seizure of goods let to hire to the execution-debtor, see *Tancred* v. *Allgood*, 4 H. & N. 444.
(*f*) *Farr* v. *Newman*, 4 T. R. 621. *Gaskell* v. *Marshall*, 1 Mood. & Rob. 132. *Fenwick* v. *Laycock*, 2 Q. B. 110.
(*g*) *Quick* v. *Staines*, 1 B. & P. 295.
(*h*) *Percival* v. *Stamp*, 9 Exch. 171. *Hooper* v. *Lane*, 6 H. L. C. 443.
(*i*) *Blades* v. *Arundel*, 1 M. & S. 711. *Ackland* v. *Paynter*, 8 Pr. 95.
(*k*) *Rideal* v. *Fort*, 11 Exch. 847.

difficulties arise in the execution of process against goods and chattels issued by authority of the courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom the process has issued, whereby sheriffs and officers are exposed to actions, it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof," it shall be lawful for the court from which such process issued, upon application of the sheriff or officer, made before or after the return of such process, and before or after any action brought, to call before them, by rule of court, as well the party issuing the process as the party making such claim, and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or officer, any of the powers conferred by the statute, and to make such rules and decisions as shall appear to be just. And the statute 1 & 2 Vict. c. 45, s. 2, enables any single judge of the superior courts to exercise the powers and authorities for the relief and protection of the sheriff or other officer given by virtue of 1 & 2 Wm. 4, c. 58, s. 6. Among the powers contained in the last-named act is the power of making rules and orders (s. 1), calling upon the claimant to appear and state the nature and particulars of his claim, and maintain or relinquish his claim, and to stay proceedings in actions, and to order actions to be tried, and direct which of the parties are to be plaintiff or defendant in such actions.

These powers may be exercised though the titles of the claimants have not a common origin, but are adverse to, and independent of, one another (*l*).

It is not necessary that the sheriff should have made an actual seizure of the goods in order to be entitled to the benefit of the statute. It is sufficient if he intends to seize the goods, having the writ or process in his possession (*m*). The object of the act is to give protection to the sheriff wherever, by reason of claims to the property, he is in danger of actions by the execution-creditor if he yields to the claim, or by the claimant if he executes the writ. But it is not intended to protect the sheriff where the resistance is to the writ itself, *i. e.* where the party in the cause objects to any execution on his own goods, for there the process itself, properly executed, would be the sheriff's defence (*n*).

The court will not lend its assistance to the sheriff where there have been delays, irregularities, or sinister dealings on the part of his officers charged with the execution of the process. If a sheriff delays to make application for relief at the request, and for the interest, of one of the

(*l*) *Bateman* v. *Farnsworth*, 29 Law J., Exch. 365.

(*m*) *Lea* v. *Rossi*, 11 Exch. 13; 24 Law J., Exch. 280. *Day* v. *Carr*, 7 Exch. 886.

(*n*) *Fenwick* v. *Laycock*, 2 Q. B. 110.

rival claimants, he places himself out of the protection of the statute (*o*). To enable him to have the benefit of the course opened to him by the statute, it is essential that he should come promptly to the court, without exercising any discretion of his own upon the matters in controversy (*p*). There are some old cases in which a great degree of strictness was exercised in admitting the sheriff to the benefit of the act, and in which protection was denied under circumstances in which it would now be conceded (*q*).

In an interpleader suit the execution-creditor may claim property which the execution-debtor has disabled himself from claiming, for an estoppel which would be binding against the execution-debtor in a claim put forward by him, will not be binding upon the execution-creditor or the sheriff, who are strangers to the acts of the execution-debtor (*r*).

Claims of landlords on sheriffs for rent in arrear.—By 8 Anne, c. 14, s. 1, it is enacted, that no goods and chattels upon lands or tenements leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises, pay to the landlord or his bailiff all such sums as shall be due for rent at the time of the taking, not exceeding one year's arrears of such rent (*s*). If the rent of the premises on which the levy is to be made is in arrear, there are no goods out of which the sheriff is bound to levy, until the arrear, not exceeding one year's rent, has been paid to the landlord. The sheriff is not called upon by law to advance the money to pay the rent, but such advance must be made by the execution-creditor; and if he neglects to make it after notice of the rent being due, the sheriff cannot be called upon to seize and sell the goods, let their value be what it may (*t*). If a year's rent is in arrear, and the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw (*u*).

If the landlord or his agent accepts an undertaking from the sheriff or his officer to pay the rent due, and consents to the removal of the goods, he waives the benefit of the statute, and cannot afterwards sue thereon. His remedy in such a case is upon the undertaking (*x*).

A trustee in whom the legal estate in reversion is vested may be the landlord within the meaning of the statute (*y*). To entitle the landlord to the year's rent, there must be an existing tenancy at an ascertained rent

(*o*) *Mutton* v. *Young*, 4 C. B. 375.
(*p*) *Crump* v. *Day*, ib. 764. *Tufton* v. *Harding*, 29 Law J., Ch. 225.
(*q*) *Holt* v. *Frost*, 3 H. & N. 821; 28 Law J., Exch. 55; 23 & 24 Vict. c. 126, s. 12.
Richards v. *Johnston*, 4 H. & N. 664.
(*r*) *Foster* v. *Cookson*, 1 Q. B. 419.
(*s*) *Cocker* v. *Musgrove*, 9 Q. B. 234.
(*t*) *Foster* v. *Hilton*, 1 Dowl. 35.
(*u*) *Rotherey* v. *Wood*, 3 Campb. 24.
(*x*) *Colyer* v. *Speer*, 4 Moore, 473.

at the time (*z*), and the execution must not be an execution put in by, or at the instance of, the landlord himself (*a*). The statute does not extend to a ground-rent due to the superior landlord (*b*), nor to goods seized by the sheriff and conveyed by bill of sale to the execution-creditor, but not removed from the demised premises, the landlord's right to distrain such goods not being taken away (*c*).

This right of the landlord to a year's rent is confined to executions upon judgments (*d*) and private extents, and does not extend to prerogative process, such as an extent in chief, or an extent in aid (*e*). If the execution-debtor holds under a lease in writing, the fact of rent being due must be established by production of the lease (*f*).

Sale by sheriffs of goods taken in execution.—It is the duty of the sheriff to sell goods seized under a *fi. fa.* within a reasonable time after the seizure; and if he fails so to do, an action is maintainable against him by the judgment-creditor (*g*). If he sells more than sufficient to satisfy the judgment-debt and costs, he will be responsible in damages to the execution-debtor (*h*). In selling goods seized under a writ of execution, he can convey no better title to the goods than the execution-debtor himself possessed at the time of the sale, and does not, when he sells, profess to do more than that, and does not warrant the title to the purchaser (*i*). If the sheriff has sold goods which were in the possession of the execution-debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution-debtor, the sheriff is not liable to an action for the wrongful sale, unless it be proved that some actual damage has accrued therefrom to the plaintiff (*k*), and that he has been prevented by the act of the sheriff from recovering possession of his goods (*k*).

Capture of the wrong person.—If the sheriff's officer has, by mistake or through false information, arrested the wrong party under a *ca. sa.*, the sheriff is responsible for the mistake, unless the plaintiff was himself instrumental in giving false information to the sheriff, or brought about his imprisonment by his own misrepresentation (*l*).

Arrest of the right person under a wrong name.—If there is no mistake as to the person of the debtor, if his identity is established, but there is a misnomer, either from the debtor's having given himself a wrong name, or

(*z*) *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.

(*a*) *Taylor* v. *Lanyon*, 4 M. & P. 316; 6 Bing. 536. *Lee* v. *Lopes*, 15 East. 230.

(*b*) *Bennet's* case, 2 Str. 786.

(*c*) *Smallman* v. *Pollard*, 7 Sc. N. R. 911; 6 M. & Gr. 1001. *White* v. *Binstead*, 13 C. B. 304.

(*d*) *Brandling* v. *Barrington*, 9 D. & R. 617.

(*e*) *Rex* v. *Southerby*, Bunb. 5.

(*f*) *Augustien* v. *Challis*, 1 Exch. 279; post, ch. 21.

(*g*) *Jacobs* v. *Humphrey*, 2 Cr. & M. 413. *Bates* v. *Winqfield*, 2 N. & M. 831.

(*h*) *Batchelor* v. *Vyse*, 4 M. & Sc. 552.

(*i*) *Chapman* v. *Speller*, 14 Q. B. 621.

(*k*) *Tancred* v. *Allgood*, 4 H. & N. 444; 28 Law J., Exch. 362.

(*l*) Post, p. 568. *Dunstan* v. *Paterson*, 2 C. B., N. S. 495; 26 Law J., C. P. 268.

from his having suffered judgment to be obtained against him in the wrong name, he will be deemed to be known as well by his assumed name as by his real name, and he will have no ground to object to the proceedings against him (*m*). If he has been sued by a wrong name, and suffers judgment to go against him without attempting to rectify the mistake, he cannot afterwards, when execution has been issued against him in the wrong name, contend that he is not the person whom the sheriff or his officer is directed to arrest (*n*). Whenever a defendant omits to plead a misnomer, he may be taken in execution in the wrong name (*o*).

Illegal arrest on Sundays.—The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sunday of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace (*p*), and the stat. 9 Geo. 4, c. 31, s. 23, makes it a misdemeanour to arrest any clergyman upon any civil process while he is performing divine service (*q*).

Incurability of a wrongful imprisonment—Arrest under one of several writs.—Where an arrest has been made on a valid writ, the sheriff may detain the party arrested on any number of valid writs which he has at the time against such party, or which afterwards reach him; but if the sheriff makes the arrest on a forged or feigned writ, or a writ which has never been sealed or stamped, and is therefore invalid, this gives him no right to detain the party on any other valid writs which may be at that time in his hands, for the sheriff cannot avail himself of a custody brought about by illegal means to execute the other writs; and if the sheriff knew, or ought to have known, that the writ under which he arrests was void, and nevertheless makes the arrest, and so deprives himself of the power of executing other valid writs in his hands, he will be responsible for culpable negligence and breach of duty. If an arrest be made on a Sunday, or in a way not authorised by law, the sheriff cannot afterwards make that valid by detaining the party under a legal writ, but must first give him an opportunity of going at large, and then execute the legal writ. But that is not the case with regard to an execution against the goods (*r*). If, therefore, a first arrest be a false imprisonment by the wrongful act of the sheriff himself or his officer, no subsequent conduct or act of his can legalize the continuance by him of that imprisonment (*s*).

Arrest of privileged persons.—In all cases of privilege, whether on the

(*m*) *Price* v. *Harwood*, 3 Campb. 108. *Walker* v. *Willoughby*, 6 Taunt. 530.

(*n*) *Fisher* v. *Magnay*, 6 Sc. N. R. 599; 5 M. & Gr. 779.

(*o*) *Crawford* v. *Satchwell*, 2 Str. 1218.

(*p*) *Wells* v. *Gurney*, 8 B. & C. 769.

(*q*) *Goddard* v. *Harris*, 5 M. & P. 122; 7 Bing. 320.

(*r*) *Eggington's* case, 2 Ell. & Bl. 728. *Percival* v. *Stamp*, 9 Exch. 171. *Hooper* v. *Lane*, 27 Law J., Q. B. 75; 6 H. L. C. 497.

(*s*) *Humphrey* v. *Mitchell*, 3 Sc. 51.

ground of the person being a member of the legislature, or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the Queen's writ, and that the privileged party must apply to the court for his discharge (*t*). The arrest by the sheriff, under a writ from any of the Queen's courts of a person privileged from arrest, by reason of his being in attendance as a witness under the process of another court, does not form the ground of any action at law, but is only the subject of an application to the court under whose authority the party has been compelled to appear as a witness, to discharge him from custody (*u*). If a party who has obtained an order of protection from the Insolvent Court, or who is attending or returning from the court (*x*), is, nevertheless, arrested under a *ca. sa.*, he is entitled to be discharged, and thus obtains the benefit of his protection, but he has no claim for damages (*y*).

Countermand of writs and warrants — Notice to the sheriff or his officer not to execute a ca. sa. will render both the bailiff and the sheriff responsible for a false imprisonment if the arrest is made after the receipt of the notice, provided the notice has been given by the plaintiff's attorney. If the officer receives notice from the attorney that the action is settled, or that the execution is withdrawn, that is a notice not to make the arrest (*z*). If a writ is left at the sheriff's office, with orders not to execute it, and the sheriff arrests under it, he is a wrong-doer: if it is to be returned *non est inventus*, it must lie; and the sheriff ought not to issue a warrant or arrest; but if the defendant is brought in, or chooses to come in and surrender, then the sheriff must arrest (*a*).

Under a writ of *fi. fa.*, which directs the sheriff to make a certain specified sum out of the goods and chattels of the defendant, and have the money at the return of the writ, the sheriff or his officer may receive the money in discharge of the execution, and withdraw the levy and liberate the defendant's goods on payment of the money; but under the writ of *ca. sa.*, which commands the sheriff to have the body of the debtor at the return of the writ to satisfy the plaintiff, and not the money to pay the debt, the sheriff has no right to receive the money and discharge the debtor, and substitute his own responsibility for that of the debtor, whose body the creditor has a right by law to keep until he has been paid the debt. If, therefore, a sheriff's officer, charged with the execution of a writ of *ca. sa.*, allows the debtor, whom he has arrested under it, to go at large on paying to him the sum mentioned in the writ, the sheriff will be

(*t*) Alderson, B., *Rideal* v. *Fort*, 11 Exch. 852.

(*u*) *Magnay* v. *Burt*, 5 Q. B. 395.

(*x*) *Chauvin* v. *Alexandre*, 31 Law J., Q. B. 79.

(*y*) *Yearsley* v. *Heane*, 14 M. & W. 834.

(*z*) *Futcher* v. *Hinder*, 28 Law J., Exch. 28. *Withers* v. *Parker*, 4 H. & N 524.

(*a*) *Hooper* v. *Lane*, 6 H. L. C. 522. *Maynay* v. *Monger*, 4 Q. B. 817.

responsible for an escape, for it is a neglect of duty on the part of the officer for which the sheriff is answerable (*b*).

Liability of the sheriff for an escape.—If a defendant, after having been taken in execution, is seen at large for ever so short a time, either before or after the return of the writ, under which he has been arrested, the sheriff is responsible for an escape, as the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff (*c*). It is the duty of the sheriff to carry his prisoner to the county gaol after he has been arrested under a *ca. sa.*, and when once in gaol, the debtor must be kept there, and cannot be allowed to go out, though with a keeper or sheriff's officer. If, therefore, he is seen without the walls of the prison, the sheriff is responsible for an escape (*d*). If the sheriff, after he has arrested the debtor, receives from the latter the amount of the debt and costs, he will be responsible to the judgment-creditor for an escape, if he sets his prisoner at large contrary to the exigency of the writ, before the judgment-creditor has been satisfied his demand; for the duty of the sheriff is to pursue the direction of the writ, and be ready at the day, not with the money, but with the body of the debtor, unless the party himself who sued out the writ interfere and agree to the liberation of the prisoner upon receipt of the money which has been paid to the sheriff (*e*).

It is the duty of an officer going to make an arrest in the execution of legal process to choose his opportunity, and to go with a force sufficient to repel opposition, and enable him to execute the process intrusted to him. If he fails to make an arrest, or if, having got the debtor into his custody, he fails to keep him for want of sufficient force, he will be responsible for a breach of duty (*f*). But if the prison take fire, or be broken open by the king's enemies of another kingdom, and the prisoner escapes, this will excuse the sheriff; but it is otherwise if the prison be broken open by traitors and rebels (*g*). And if the escape has been brought about by misrepresentation or misconduct on the part of the plaintiff, the latter has no cause of complaint against the sheriff (*h*).

By 8 & 9 Wm. 3, c. 27, s. 8, it is enacted, that if the keeper of any prison shall, after one day's notice in writing, given for that purpose, refuse to show any prisoner committed in execution to the creditor, at whose suit he was committed, or to his attorney, every such refusal shall be adjudged an escape in law.

Recapture upon fresh pursuit.—The sheriff may retake the debtor upon

(*b*) *Woods* v. *Finnis*, 7 Exch. 372.
(*c*) *Hawkins* v. *Plomer*, 2 W. Bl. 1048. *Moore* v. *Moore*, 27 Law J., Ch. 387.
(*d*) *Williams* v. *Mostyn*, 4 M. & W. 152.
(*e*) *Slackford* v. *Austen*, 14 East, 473 *Woods* v. *Finnis*, 7 Exch. 372.
(*f*) *Nicholl* v. *Darley*, 2 Y. & J. 403.
(*g*) *Southcote's* case, 4 Co. 84a.
(*h*) *Hiscocks* v. *Jones*, 1 M. & M. 269; post, p. 568.

fresh pursuit in any county without an escape-warrant, and plead the recapture in bar of an action for damages.

Discharge of debtors taken in execution.—By 15 & 16 Vict. c. 76, s. 126, it is enacted, as we have seen, that a written order, under the hand of the attorney in the cause, by whom any writ of *ca. sa.* has been issued, shall justify the sheriff, or person in whose custody the party may be, under such writ, in discharging such party, unless the person for whom such attorney professes to act shall have given written notice to the contrary. The sheriff is not bound to discharge a debtor from his custody immediately on receiving an order for his discharge. He is entitled to a reasonable time to search his office, to ascertain whether there are any other writs lodged against him (*i*).

Arrest of the person and seizure of goods under void or irregular process.—In depriving a man of his liberty and seizing of his goods, the sheriff and his officers act at their peril, so that if the process is feigned, forged, or simulated, and is not the process or order of the court, it is a mere nullity, and the sheriff can derive no protection from the piece of waste-paper (*k*). But if the sheriff has acted under a genuine writ, issued from one of the superior courts, he and his officers acting under him are protected by it, although it be on the face of it irregular, as a capias against a peeress (*l*); or void in form, as a *ca. sa.* not made properly returnable, for the officers ought not to examine the judicial act of the court, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it (*l*). But the parties who have issued the void or irregular process are, as we have seen, responsible for all damage and injury done in the execution of it after the process has been set aside by the court or a judge, unless it has been set aside on the terms that no action shall be brought (*m*). And if a writ of *ca. sa.* has been issued upon a judgment for less than 20*l.* in an action, for a debt, the party arrested under the writ may maintain an action both against the attorney who sued out the writ and the client who set the attorney in motion, for damages for the wrongful imprisonment, although the writ has not been set aside, for the statute expressly declares that no person shall be taken in execution upon such a judgment.

Generally speaking, however, so long as the process has not been set aside, it is a protection to the attorney who has issued it, and to the client by whose commands it was issued (*n*); and though when it has been set aside it is no longer a justification to them, yet it always remains

(*i*) *Samuel* v. *Buller*, 1 Exch. 440.
(*k*) *Hooper* v. *Lane*, 10 Q. B. 501; 6 H. L. C. 443.
(*l*) *Countess of Rutland's* case, 6 Rep. 54 a. *Cotes* v. *Michill*, 3 Lev. 20.
(*m*) *Parsons* v. *Lloyd*, 3 Wils. 341.
(*n*) *Riddell* v. *Pakeman*, 2 C. M. & R. 33. *Blanchenay* v. *Burton*, 4 Q. B. 707.

a justification to the sheriff and his officers, who had no option but to obey it (*o*).

A writ of execution therefore may, at the same time, be both a good writ and a bad writ; that is to say, a writ set aside for irregularity may be good as to the sheriff and all persons acting under him, and bad as to the persons who sued it out (*p*).

If the sheriff, by force of a *fieri facias*, sell goods, and afterwards the judgment is reversed by writ of error, the defendant shall not have restitution of his goods, but the value of them, for which they were sold; and there are two reasons for this:—1. If the sale of the sheriff, by force of a *fieri facias*, should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence no execution done. 2. In the case of a *fieri facias*, the sheriff is compellable to make and levy the debt of the goods, &c. of the defendant, and therefore there is reason that it should stand (*q*).

Exemption of sheriffs and officers from responsibility when the injury has been brought about by misrepresentation of the plaintiff.—Every person who, by misrepresentation or misstatement, causes an officer charged with the execution of legal process to make a mistake and arrest the wrong party, or seize his goods, cannot complain of the wrong which he has himself occasioned. If by misrepresentation he causes himself to be arrested, he is the author of his own misfortune, and has no right to charge it upon the officer (*r*). If the plaintiff has represented himself to be the person against whom the process has been issued, and is arrested in consequence of that representation, he is estopped, as we have seen (ante, p. 490), as regards that imprisonment, from denying that he was the right person; but, after he has given notice of the real state of facts to the officers, and given them a fair opportunity of inquiry, the detention would be unlawful (*s*).

False returns to writs of execution.—If the sheriff makes a false return to a writ of execution, he is responsible in damages to the execution-creditor if any actual damage has resulted to him from the false return (*t*). A return of *nulla bona* to a writ of *fi. fa.* means, that there are no goods applicable to the execution of the plaintiff's writ, not that there are no goods at all belonging to the execution-debtor. If, therefore, the payment of prior claims, such as rent due to the landlord, or sums leviable under prior writs of execution, has exhausted the fruits of the levy, the sheriff has no goods out of which the damages can be levied, and a return of *nulla*

(*o*) *Jones* v. *Williams*, 8 M. & W. 356; Best, J., 5 B. & Ald. 746. *Turner* v. *Felgate*, 1 Lev. 95.

(*p*) Parke, B., 9 Dowl. 710. *Doe* v. *Thorn*, 1 M. & S. 427.

(*q*) *Hoe's* case, 5 Co. 90 b.

(*r*) *Fisher* v. *Magnay*, 5 M. & Gr. 778.

(*s*) *Dunston* v. *Paterson*, 2 C. B., N. S. 495; 26 Law J., C. P. 268.

(*t*) *Wylie* v. *Birch*, 4 Q. B. 566.

bona is a good return (*u*). If the sheriff returns that he has seized certain goods and chattels, he ought to specify their value, and not return that their value is to him unknown (*x*). A reasonable degree of certainty in the language of the return is sufficient.

The sheriff is not allowed to put a construction on his own return which would make it bad, when it admits of another construction which will make it good (*y*).

Extortion by sheriffs and their officers.—By 29 Eliz. c. 4, s. 1, it is enacted, that it shall not be lawful for any sheriff, under-sheriff, bailiff, &c., nor for any of their officers, deputies, &c., by reason or colour of their offices, to receive or take for the serving or executing any extent or execution, more consideration or recompense than is by that act limited and appointed, upon pain that every sheriff, under-sheriff, &c., their officers, &c., who shall directly or indirectly do the contrary, shall forfeit to the party grieved treble damages, and pay a penalty as therein mentioned, but the act is not to extend to fees taken for executions within any city or town corporate. The statute 7 Wm. 4, and 1 Vict. c. 55, further enacts that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the courts of Westminster, under the sanction of the judges, and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly. And by 5 & 6 Vict. c. 98, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution (*z*); but there shall be payable to the sheriff, or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under 7 Wm. 4 and 1 Vict. c. 55. The sheriff still continues entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under 7 Wm. 4 and 1 Vict., and to no more. If his officer takes more the sheriff is guilty of extortion, and is liable to an action for treble damages (*a*).

Duties and responsibilities of the high-bailiff and bailiffs of the county court.—By 9 & 10 Vict. c. 95, s. 33, the high-bailiff of the county court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers. His liability is co-extensive with that of the sheriff, but he is not respon-

(*u*) *Shattock* v. *Carden*, 6 Exch. 725. *Wintle* v. *Freeman*, 11 Ad. & E. 547. *Heenan* v. *Evans*, 4 Sc. N. R. 2.

(*x*) *Barton* v. *Gill*, 12 M. & W. 315.

(*y*) *Reynolds* v. *Barford*, 8 Sc. N. R. 239.

(*z*) *Hayley* v. *Racket*, 5 M. & W. 620.

(*a*) *Wrightup* v. *Greenacre*, 10 Q. B. 13. *Pilkington* v. *Cooke*, 16 M. & W. 615. *Woodgate* v. *Knatchbull*, 2 T. R. 155.

sible for things done by his bailiffs under colour of some special power or authority supposed to be given to them under the County Courts Act, and not done under the authority or in execution of a warrant (*b*).

Liability of ministerial officers where the court had no jurisdiction, and no authority to issue the process.—At the common law a grievous responsibility was thrown upon ministerial officers of courts of inferior and limited jurisdiction, where the court had made orders and directed the issue of process, without jurisdiction in the matter, or where it had exceeded its jurisdiction. It was held, that when the court had not jurisdiction of the cause, then the whole proceeding being *coram non judice*, actions would lie against the party who sued out and against the officer or minister of the court who executed the precept or process of the court, without any regard to such precept or process; "for the officer is not bound to obey him who is not judge of the cause any more than he is bound to obey the mere precept or order of a stranger, for the rule is, *judicium a non suo judice datum nullius est momenti*" (*c*). Therefore, where an officer acting under a warrant of a commissioner of bankrupts took and detained a party in custody under it, and it appeared that the commissioner had no jurisdiction to make the warrant, it was held that an action of trespass was maintainable against the officer (*d*). But the mischiefs arising from this unreasonable state of the law have to a great extent been remedied by the legislature (*e*).

Duty of bailiffs of the county court to satisfy the landlord's claim for rent.—By 19 & 20 Vict. c. 108, s. 75, it is enacted, that the stat. 8 Anne, c. 14 (ante, p. 562), shall not apply to goods taken in execution under the warrant of a county court; but the landlord may, within five days of the taking, or before the removal of the goods, make a claim in writing for rent, signed by himself or his agent, stating the amount of the rent in arrear, and the time for which it is due; and if such claim be made, the officer making the levy is to distrain for the rent so claimed, and the costs of the distress, but he is not to sell within five days, unless the goods be of a perishable nature, or upon the request in writing of the party whose goods have been taken. After the five days the bailiff is to sell such of the goods as will satisfy, first the costs of the sale, next the claim of the landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant issued. If any replevin be made, the bailiff is notwithstanding to sell such portion of the things taken as will satisfy the costs of the sale under the execution, and the amount for which the warrant issued. Any over-

(*b*) *Smith* v. *Pritchard*, 8 C. B. 588.
(*c*) The *Marshalsea* case, 10 Co. 76a.
(*d*) *Watson* v. *Bodell*, 14 M. & W. 57.
(*e*) Post, pp. 574–577, and ch. 15.

plus of the sale or residue of the goods is to be returned to the defendant.

Things not distrainable by county-court bailiffs in satisfaction of rent.— The county-court bailiff cannot, under this statute, distrain the goods of a stranger on the demised premises for the purpose of satisfying the landlord's rent (*f*).

Liabilities of gaolers.—A gaoler who receives a prisoner under a warrant is not responsible in damages if the warrant has been irregularly issued; but if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for the detention. Where the plaintiff had been delivered into the custody of the gaoler of a liberty under a good warrant for arrest, though the execution of it was illegal, inasmuch as the plaintiff, under a warrant to the bailiff of the liberty, had been arrested without the liberty, and afterwards carried into the liberty and delivered to the gaoler, it was held that an action could not be maintained against the gaoler, who was not bound to inquire whether the original arrest was tortious or not. "And it was said by the court, that if he had been informed of the tortious taking (without being of the covin or practising therein), he ought, nevertheless, to detain the prisoner, he being delivered to him with a good warrant of arrest, though the execution of it was illegal; for if such information had been false, and the gaoler had set the prisoner at large, he had been liable for an escape. And the plaintiff was not without remedy, for he had a good action against wrong-doers (*g*). But if a sheriff's officer arrests the wrong man, and hands him over to a gaoler, there, as the arrest is altogether unjustifiable, and the warrant no protection, the gaoler who receives and detains the wrong man is responsible for the wrongful imprisonment, and cannot justify under the warrant, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not, consistently with his duty, have refused to receive and detain him (*h*). But if the party thus wrongfully arrested does not, when brought to the gaoler, complain of the wrongful arrest, or give the gaoler any means of ascertaining that he is not the person named in the warrant, nominal damages only would be recoverable.

Exemption from liability of the messenger of the Court of Bankruptcy and his assistants acting under warrant of the court.—By the Bankrupt Act, 12 & 13 Vict. c. 106, s. 106, power is given to the Court of Bankruptcy, where there is reason to suspect and believe that property of a bankrupt is concealed in any house or place not belonging to the bankrupt, to

(*f*) *Beard* v. *Knight*, 8 Ell. & Bl. 865; 27 Law J., Q. B. 359. *Foulger* v. *Taylor*, 8 W. R. 279.

(*g*) *Olliet* v. *Bessey*, 2 Jones, 214.

(*h*) *Aaron* v. *Alexander*, 3 Campb. 34. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 Law J., Exch. 134; Bro. Abr. TRESPASS, pl. 133, 256, 265.

grant a search-warrant to the messenger and his assistants, or other person appointed by the court; and it is enacted, that it shall be lawful for such messenger and his assistants, or other person, to execute such warrant, and that they shall be entitled to the same protection as is allowed by law in execution of a search-warrant for property reputed to be stolen or concealed (*i*).

Also (s. 109), that it shall be lawful for any messenger of the court, and his assistants acting under warrant of the court, to break open any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt where the bankrupt or any of his property shall be reputed to be, and seize upon the body or property of the bankrupt; and if the bankrupt be in prison or in custody, it shall be lawful for the messenger and his assistants to seize any property of the bankrupt (his necessary wearing apparel only excepted) in the custody or possession of the bankrupt, or of any other person in any prison or place where the bankrupt is in custody (*k*).

SECTION III.

OF ACTIONS AGAINST JUDGES, SHERIFFS, AND MINISTERIAL OFFICERS AND THEIR ASSISTANTS, AND PARTIES SETTING THEM IN MOTION.

Actions against county-court judges—Notice of action.—Provision is made by the County Courts Act (19 & 20 Vict. c. 108, s. 19) for the prosecution of actions in the county court against judges of the county court in the court of a district adjoining the district in which the defendant is judge. By 9 & 10 Vict. c. 95, s. 138, notice of action is required, as we have seen, to be given to all persons acting in execution of the County Courts Act. If, therefore, a county-court judge, in making an order of commitment, acts under the *bonâ-fide* belief that his duty as judge of the county court renders it incumbent on him to do so, notwithstanding a prohibition has been issued, the act done by him must be considered as done in pursuance of the County Courts Act, and he is entitled to notice of action (*l*).

All judges of courts of inferior jurisdiction acting under the authority of an act of parliament, are in general entitled to notice of action, and to an opportunity of tendering amends and paying money into court, and the

(*i*) Post, ch. 15.
(*k*) *Edge* v. *Parker*, 8 B. & C. 700.
(*l*) *Booth* v. *Clive*, 10 C. B. 835; ante, pp. 499-503.

action against them must in general be brought within a certain limited period.

Actions against a sheriff and his officers for a wrongful arrest.—An action for false imprisonment may be maintained by a person arrested under a *ca. sa.* upon a judgment for less than 20*l.* in an action for a debt, although the writ has never been set aside; for where an act of parliament says that no person shall be taken in execution upon such a judgment, he who does what the act forbids is responsible for an assault and false imprisonment. The sheriff could justify under the writ, but not the party who sues out and sets in motion the forbidden process (*m*). Generally speaking, however, the process must, as we have seen, be set aside before an action can be maintained for anything done under it (ante, p. 567).

Remedies against sheriffs and officers for an escape.—Formerly the statutes 13 Edw. 1, c. 11, and 1 Ric. 2, c. 12, gave the party who suffered by an escape of his debtor the same remedy against a sheriff or gaoler guilty of the escape that he had against the debtor, and enabled him to recover from such sheriff or gaoler the whole debt and costs in an action of debt; but it has recently been enacted by 5 & 6 Vict. c. 98, s. 31, that if any debtor in execution shall escape out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person at whose suit such debtor was imprisoned, and shall not be liable to any action of debt in consequence of such escape.

Actions to recover money in the hands of the sheriff.—After a return to a *fi. fa.* that the money is levied, the sheriff may be liable to an action for money had and received without any demand of payment (*n*).

Of staying proceedings in actions against sheriffs, their officers and assistants.—We have already seen, that where an action has been brought against a sheriff or his officers for wrongfully seizing or converting the goods of the plaintiff in the execution of process issued by the authority of the courts, it is competent for the court from which the process issued to call before them, by rule of court, the party issuing the process, and the person bringing the action, and compel the latter to state the nature and particulars of his claim to the goods seized by the sheriff, and to order proceedings for deciding upon the validity of the claim, and in the meantime to stay proceedings in the action against the sheriff (ante, pp. 560–562). This statute refers, as we have seen, to the execution of process against goods and chattels, and is intended to protect the sheriff from vexatious actions by parties against whom the process is not directed, but who claim to be the owners of the goods seized under it by

(*m*) *Brooks* v. *Hodgkinson*, 4 H. & N. 712. (*n*) *Dale* v. *Birch*, 3 Campb. 347.

the sheriff. If, therefore, there has been an unlawful breaking open of the outer door of a dwelling-house by the sheriff, in order to effect the seizure of the chattels, this is a wrong quite independent of any question of ownership of the goods seized, and the court or a judge has no authority to stay proceedings in an action brought in respect thereof. The statute is altogether silent respecting such a subject-matter of complaint, and therefore affords the sheriff no protection in respect of it. "It is quite clear," observes Maule, J., "that an action for unlawfully breaking and entering a house in the execution of process is no more within the contemplation of this act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is charged as a wrong-doer; there is nothing to interplead about; nobody but himself is interested in the result, or liable for the consequences" (*o*).

But when there has been no independent trespass, when the outer door of a dwelling has not been broken open, and the entry into the house would be lawful, and protected by the process if the goods found therein should turn out to be the goods of the execution-debtor, the entry into the house cannot be separated from the seizure of the goods, but the whole cause of action may be stayed until the ownership of the goods has been determined by interpleader (*p*). If that is determined in favour of the sheriff, all further proceedings against him will be stayed; if it is decided against him, the action may be proceeded with for the recovery of damages for the trespass in the house as well as for the seizure of the goods (*q*).

If the execution-creditor has personally interfered in making the seizure, and directed the movements of the sheriff (ante, p. 504), so as to render himself liable to an action, the court or a judge has power to interfere for his protection, as well as for the protection of the sheriff, and to stay proceedings against him (*r*).

Actions against high-bailiffs of county courts and their assistants.—By the County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 21, it is enacted, that if an action be brought in the county court against an officer of the county court, the summons may issue in the district of which he is an officer, or in an adjoining district, the judge of which is not the judge of a court of which the defendant is an officer. And by the County Courts Act, 9 & 10 Vict. c. 95, s. 138, notice of action is, as we have seen, required to be given to all persons acting in execution of that act. Officers of the county court, and parties acting in their aid by their command in the intended execution of the County Courts Act, or of county-

(*o*) *Hollier* v. *Laurie*, 3 C. B. 342.
(*p*) *Winter* v. *Bartholomew*, 11 Exch. 711.
(*q*) *Foster* v. *Pritchard*, 2 H. & N. 151.
(*r*) *Carpenter* v. *Pearce*, 27 Law J., Exch. 143.

court process, are in general entitled to notice of action, and to an opportunity of tendering amends before action, and paying money into court after action (ante, p. 498). If the bailiff of a county court, under a warrant against the goods of A, by mistake takes those of B, this is an act done in pursuance of the County Courts Act, which entitles the bailiff to notice of action (*s*).

Statutory protection to high-bailiffs, and persons acting by their order, or in their aid, in the execution of county-court warrants.— By 13 & 14 Vict. c. 61, s. 19, it is enacted, that no action shall be brought against any high-bailiff or bailiff, or any person acting by his order, or in his aid, for anything done in obedience to any warrant under the hand of the clerk of the county court and the seal of the said court, until demand hath been made, or left at the office of such high-bailiff, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of the warrant, and the same hath been refused or neglected for the space of six days after the demand; and in case, after demand and compliance therewith, by showing the warrant, and permitting a copy to be taken, any action shall be brought against the high-bailiff, bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the clerk of the court who signed or sealed the warrant defendant; then, on producing or proving the warrant at the trial of the action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant; and if the action be brought jointly against the clerk and high-bailiff, or bailiff, or person acting in his aid, then, on proof of the warrant, the jury shall find for the high-bailiff or bailiff, and person so acting as aforesaid, notwithstanding such defect or irregularity.

And by 19 & 20 Vict. c. 108, s. 60, it is further enacted, that no officer of a county court, in executing a warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings. Also (s. 55), that any warrant to a high-bailiff to give possession of a tenement under that statute, shall justify the bailiff named in the warrant in entering upon the premises

(*s*) *Burling* v. *Harley*, 3 H. & N. 271; 27 Law J., Exch. 258. As to parties interfering in the execution of the process, *Cronshaw* v. *Chapman*, 31 Law J., Exch. 277.

named therein, with such assistants as he shall deem necessary, and in giving possession; but the entry must be made between the hours of nine in the morning and four in the afternoon, and the warrant must be executed (s. 56) within three months from the day it bears date.

Of the staying of proceedings in actions against high-bailiffs and officers of the county court.—The statute 9 & 10 Vict. c. 95, s. 118, enacts, that if any claim shall be made to goods or chattels taken in execution under the process of any county court holden under that act, or to the proceeds or value thereof by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of the process, as well before as after any action brought against such officer, to issue a summons, calling before the court as well the party issuing the process as the party making the claim, and thereupon any action which may have been brought in any superior or inferior court in respect of the claim shall be stayed, and the court in which the action has been brought, or any judge thereof, on proof of the issue of the summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all further proceedings in the action; and the judge of the county court is to adjudicate upon the claim, and make such order in respect thereof and of the costs as to him shall seem fit. And where any claim shall be made under this section, the claimant may deposit with the plaintiff either the amount of debt or the value of the goods claimed, such value to be fixed by appraisement in case of dispute, and to be paid into court to abide the decision of the judge upon the claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing, the bailiff shall sell the goods as if no such claim had been made (*t*).

When the bailiff or officer enters the house of a third party and seizes goods therein, he is justified if they belong to the execution-debtor. If they do not, he is a trespasser. The common mode of dealing with a case of this sort is to make an order under the Interpleader Act, directing an issue to be tried to determine the ownership of the goods seized, and prohibiting any action against the bailiff until that question has been determined. If it is decided in favour of the bailiff, the court will prohibit all further proceedings against him in the action, unless there is some substantive cause of complaint beyond that of entering the house to make the seizure (*u*). If it is decided against the bailiff, and it is found that he has entered the house and seized the goods of the wrong party, and has committed a trespass by entering the house as well as by seizing

(*t*) 19 & 20 Vict. c. 108, s. 72. (*u*) *Jessop* v. *Crawley*, 15 Q. B. 212.

the goods, damages may then be recovered for the unlawful entry into the house, as well as for the seizure of the goods (*x*).

If the action is brought for an unlawful breaking and entering of the outer door of a dwelling-house, as well as for an unlawful seizure of the goods, the judge has no power to stay the proceedings, as the cause of action is quite independent of any question of ownership of the goods, and does not, as we have seen, fall within the provisions of the Interpleader Acts (*y*).

Statutory protection in favour of persons acting in execution of the Bankrupt Act.—By the Bankrupt Act, 12 & 13 Vict. c. 106, s. 159, it is enacted, that every action brought against any person for anything done in pursuance of the act (*z*) shall be commenced within three months next after the fact committed, and the defendant may plead the general issue, and give the act and the special matter in evidence at the trial, and that the same was done by authority of the act; and if it shall appear so to have been done, or that the action was commenced after the time limited for bringing it, the jury shall find for the defendant. Also (s. 107), that no action shall be brought against any messenger or his assistants, or other person appointed by the court, for anything done in obedience to any warrant of the court, unless demand of the perusal and copy of the warrant has been made, or left at the usual place of abode of the messenger or his assistant, or other person, by the party intending to bring the action, or by his attorney or agent, in writing, signed by the party demanding the same, and unless the same hath been refused or neglected for six days after the demand; and if, after demand and compliance therewith, any action be brought against the messenger or assistant, or person so appointed, without making the petitioning creditor defendant, if living, the jury, at the trial of the action, on the production and proof of the warrant, shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the court by which the warrant shall have been granted; and if such action be brought against the petitioning creditor and the messenger or assistant, or person so appointed, the jury shall, on proof of the warrant, give their verdict for the messenger or assistant, or person so appointed, notwithstanding any such defect of jurisdiction; and if the verdict shall be given against the petitioning creditor, the plaintiff shall recover costs, &c. Also (s. 108), that in any such action brought against the petitioning creditor, either alone or jointly with any messenger or assistant, or other person so appointed by the court, for anything done in obedience to the warrant of the court, proof by the plaintiff in such action that the defendant or defendants, or any

(*x*) *Foster* v. *Pritchard*, 2 H. & N. 151; 26 Law J., Exch. 215.
(*y*) *Cater* v. *Chignell*, 15 Q. B. 219.
Hollier v. *Laurie*, 3 C. B. 339.
(*z*) *Edge* v. *Parker*, 8 B. & C. 700.

of them, is, or are, petitioning creditor or creditors, shall be sufficient for the purpose of making such defendant or defendants liable, in the same manner and to the same extent as if the act complained of in such action had been done or committed by such defendant or defendants.

Plaintiffs in actions against sheriffs.—To entitle a party to sue a sheriff or his officer for neglecting the duties of his office, he must show that he had sued out some process which entitled him to the performance of some duty at the hands of the sheriff which the latter has neglected or negligently executed, or he must show that he has been damnified either in his person or his property by some act of trespass, or wrongful and unauthorised proceeding, on the part of the sheriff; or if he sues upon an act of parliament giving damages to the party grieved, he must show that he is the party grieved within the meaning of the statute (*a*).

Of the defendants in actions for wrongs done under colour of legal process.—The sheriff is liable, as we have seen, for all acts done and neglects of duty by his bailiffs and officers in the execution of a writ, on the ground that if the sheriff thinks fit to commit the execution of a writ, which he is bound to execute, to another, he is responsible if that person does not execute it properly, and is in the same condition as if he had executed it himself; the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him. Therefore, if a sheriff's officer arrests a wrong person, or arrests the right person after the return day, or takes a wrong person's goods under a *fi. fa.*, or even if he arrest under a writ of *fi. fa.*, or is guilty of extortion in insisting on being paid money as the price of liberation from imprisonment under a *ca. sa.*, the sheriff is liable (ante, pp. 555–569). Though none of these acts are done in pursuance of the authority of the writ, yet they are done in the execution, or, as it is said, under the colour of it; and the sheriff is exactly in the same position as if he had done those acts himself (*b*). But if, after the writ has been executed, the officer takes upon himself to do things for which he has no colour of authority, the sheriff will not be responsible for his acts. Thus, if a debtor who has been arrested under a *ca. sa.* induces the officer, contrary to his duty in that behalf, to accept the amount of the debt and costs, and discharge him, and the officer neglects to pay over the money to the attorney of the execution-creditor, and the debtor is again arrested under a fresh writ upon the same judgment, the sheriff is not, as we have seen, responsible to such debtor for the default of his officer in not paying over the money, as the sheriff has given him no authority to receive the money, and the transaction is in the nature of a private arrangement between the debtor and the officer (ante, p. 555).

(*a*) *Woodgate* v. *Knatchbull*, 2 T. R. 158. *Boyce* v. *Higgins*, 14 C. B. 14. *Hollis* v. *Marshall*, 2 H. & N. 755.

(*b*) *Woods* v. *Finnis*, 7 Exch. 371.

The sheriff and his officer, who, by inadvertence or mistake, have entered the house and seized the goods of the wrong person, or have arrested a wrong party in the execution of legal process, are responsible for the trespass, "although the taking be by the showing of the party to the suit" (*c*); and so are all persons, whether plaintiffs or attornies in the action, or strangers who interfere in any way, by giving directions or assistance, or officiously volunteering information to the officers (ante, p. 505); for every person who procures or directs the commission of an act of trespass is as much responsible for the injury as the person who actually commits it; but a simple intimation or direction to the officer that he is not to be prevented by an adverse claim from seizing goods found in the dwelling-house of the execution-debtor, will not render the party interfering only to such an extent responsible for a wrongful seizure by the bailiff (*d*).

Sheriffs' officers executing a writ of *ca. sa.* are not the agents or bailiffs of the plaintiff for whose benefit the writ is issued, and if they arrest a wrong party the plaintiff in the action is not responsible for their misconduct, unless either he or his attorney have personally interfered and have superintended or directed the movements of the sheriff or his officers (*e*). If the plaintiff in an action, or his attorney, does no more than set the court in motion, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers, unless by special plea he admits and undertakes to justify his concurrence in the act, in which case he can only make out his justification by showing a legal authority under which he acted (*f*); and an attorney who merely delivers a writ of execution to the sheriff, and does not take upon himself to give wrong directions, and does not, by word or act, induce the officer to seize the wrong party, is not responsible for the mistakes of the officer and for a trespass committed by the latter in seizing the goods of the wrong person, or seizing beyond the limits of his bailiwick, although he believes that the officer is about to go wrong and to exceed his duty (*g*).

It has been held, that if the attorney gives wrong directions to the sheriff or his officers, and thereby causes them to seize the goods of the wrong man, the client is responsible for the act of the attorney (*h*).

If goods which have been let to hire to an execution-debtor have been seized and sold by a sheriff under the writ of execution, the sheriff cannot,

(*c*) 2 Roll. Abr. 552. *Jarmain* v. *Hooper*, 7 Sc. N. R. 603; 13 Law J., C. P. 63; 6 M. & Gr. 848.

(*d*) *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 Law J., Exch. 277.

(*e*) *Wilson* v. *Tummon*, 6 M. & Gr. 244; 6 Sc. N. R. 906. *Walley* v. *M'Connell*, 13 Q. B. 911. *Woollen* v. *Wright*, 7 H. & N.; 31 Law J., Exch. 513. *Whitmore* v. *Greene*, 13 M. & W. 104.

(*f*) *Kinning* v. *Buchanan*, 8 C. B. 291. *Abley* v. *Dale*, 10 C. B. 62. *Painter* v. *Liv. Gas Co.*, 3 Ad. & E. 433.

(*g*) *Sowell* v. *Champion*, 6 Ad. & E. 417.

(*h*) *Jarmain* v. *Hooper*, 6 M. & Gr. 850; 7 Sc. N. R. 681. *Collett* v. *Foster*, 2 H. & N. 361. *Brooks* v. *Hodgkinson*, 4 ib. 712; ante, p. 506.

as we have seen, be sued, unless it be proved that some actual damage has been sustained by the plaintiff by the act of the sheriff (*i*); but the purchaser who takes away the goods without any right or title so to do, may be made responsible in damages for the conversion of the property. If acts of trespass have been committed under colour of legal process, which has been set aside as irregular, both the client who commands the attorney and the attorney who sues out the process are, as we have already seen, responsible as principals in the commission of the acts of trespass done by their procurement and commandment (*k*). They are in the same situation after it has been set aside as if they had themselves, orally or by writing, desired the sheriff or his officer to make the seizure (*l*).

Plaintiff's declaration of his cause of action.—The ordinary form of declaration for a trespass, or for the conversion of chattels, or for an assault or false imprisonment (ante, pp. 307, 506, 507), is applicable to cases where judges of inferior courts have ordered or directed a seizure of the person or the property of the plaintiff in respect of matters over which they had no jurisdiction, or where they have exceeded their jurisdiction, and have rendered themselves liable to an action for damages: also where sheriffs and ministerial officers have exceeded their authority, and committed unauthorised acts of trespass in the execution of the process intrusted to them.

Declaration against a sheriff for not executing the Queen's writ, or for an escape.—The principle on which an action is maintainable against a sheriff for a neglect of duty in not arresting or not making a levy in obedience to the Queen's writ directed to him, or for permitting an escape, is not simply because the plaintiff has sued out a writ and delivered it to the sheriff and the sheriff has not obeyed it, but because in mesne process he has a cause of action, in final process he has a judgment against the party defendant, which gives him an interest in the writ, and creates a duty in the sheriff towards him (*m*). There is no duty due from the sheriff to the party suing out a writ, unless he be entitled so to do. It is essential, therefore, in an action against a sheriff for disobeying a *ca. sa.* or a *fi. fa.*, that the party should show that he had a judgment in his favour.

The title to sue out a capias under 1 & 2 Vict. c. 110, s. 3, depends upon the party being a plaintiff in a suit, as well as having a cause of action. By s. 3 a plaintiff alone can sue it out, by s. 5 he must do so after the commencement of the suit, which, by s. 2, must be begun by a writ of summons. The plaintiff, therefore, in an action against the sheriff

(*i*) *Tancred* v. *Allgood*, 4 H. & N. 438; 28 Law J., Exch. 362.

(*k*) *Codrington* v. *Lloyd*, 8 Ad. & E. 449. *Barker* v. *Braham*, 3 Wils. 376. *Bates* v. *Pilling*, 6 B. & C. 39.

(*l*) Tindal, C. J., *Wilson* v. *Tummon*, 6 Sc. N. R. 905; 6 M. & Gr. 236. *Green* v. *Elgie*, 5 Q. B. 114.

(*m*) *Jones* v. *Pope*, 1 Saund. 38 b.

for not arresting a debtor under a capias founded on 1 & 2 Vict. c. 110, s. 3, should show, on the face of his declaration, that he had a cause of action against such debtor, and commenced an action against him, and should set forth the making of an affidavit by him, as the plaintiff in such action, pursuant to the requirement of the statute in that behalf; the obtaining of a special order from a judge to hold the debtor to bail; the issue of a writ of capias to the sheriff (setting out the writ and endorsement thereon); the delivery of the writ to the sheriff, and the sheriff's breach of duty in not executing it.

If the plaintiff complains against the sheriff for not arresting under a *ca. sa.*, or for not levying under a *fi. fa.*, or for an escape, he should, after showing the recovery of his judgment, state the issue of the writ thereon, for the purpose of having execution of the said judgment (setting forth the substance of the writ and the endorsement thereon), the delivery of such writ to the sheriff to be executed, and should then disclose the sheriff's neglect of duty, either in not making the arrest, or in making the arrest and gaining possession of the person of the debtor, and then permitting him to escape, or in not levying under a *fi. fa.*, showing that after the delivery of the writ to the sheriff, and before the return thereof, there were goods of the debtor within the defendant's bailiwick, out of which he could have levied the monies directed by the writ to be levied.

Declarations against sheriffs for removing goods taken in execution, without paying rent due to the landlord, should show that a messuage, lands or tenements, had been demised by the plaintiff to a named tenant for a certain term, at a specified rent, payable half-yearly; that a certain sum of money, being half a year's or a year's rent, as the case may be, of the messuage, &c., became due to the plaintiff, and that during the existence of the tenancy, and whilst the rent was in arrear, the defendant then being sheriff, seized certain goods and chattels of the tenant, then being upon the demised messuage, lands or tenements, &c., under a writ of execution against the tenant; that the defendant at the time of the seizure, and before the removal of the goods from the premises, had notice of the half-year's or year's rent so being due and in arrear (*n*), and that he nevertheless wrongfully removed the goods before the plaintiff had been paid the said arrears of rent, contrary to the statute in that behalf made (*o*).

Declarations against sheriffs for treble damages for extortion should set forth the recovery of a judgment; the issue of a writ of *fi. fa.* to the sheriff; the indorsement on the writ; the delivery of the writ to the defendant as sheriff of some specified county; the seizure by the defendant

(*n*) *Andrews* v. *Dixon*, 3 B. & Ald. 645. *Ryle*, 11 M. & W. 16. *Thurgood* v. *Richardson*, 7 Bing. 428.
(*o*) 8 Anne, c. 14, s. 1. *Smallman* v. *Pollard*, 6 M. & Gr. 1009. *Riseley* v.

as sheriff; the amount of the levy; and that the defendant, by reason and colour of his office, wrongfully received and took from the plaintiff, for the serving and executing the said execution, a certain specified sum (*p*), averring it to be a larger consideration and recompense than is limited and appointed to be taken in that behalf (*q*). When the action is brought against the sheriff's officer, the declaration should set forth the warrant made and delivered by the sheriff to the defendant, as one of his bailiffs, to be executed, and the levy made thereunder by the defendant, and the extortionate charges then made by him (*r*). When the declaration is for extortionate charges on the execution of several writs, the declaration should show what sum ought to have been taken, and what was the extortionate charge on each writ (*s*). It is not necessary to recite the statute; it is enough to state that the thing was done contrary to the form of the statute in such case made and provided (*t*).

The plea of Not guilty in actions for taking, detaining, or converting goods and chattels, operates, as we have seen, as a denial of the wrongful act complained of, but not of the plaintiff's property in the goods and chattels; and no other defence than such denial is admissible under that plea (ante, pp. 308, 309). In actions for an assault and false imprisonment, the plea of Not guilty merely puts in issue the fact of the commission of the trespass (ante, p. 507); and in actions against a sheriff or his officers for an escape, the plea of Not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings (*u*). All matters of inducement set forth in the declaration, if intended to be denied and put in issue by the defendant, should be specially traversed (*v*); and all matters of justification and excuse must, as we have seen, be specially pleaded, and cannot be given in evidence under the general issue (*x*).

A justification, therefore, of an imprisonment, on the ground that it was an act done by a judge of a court of record acting in his judicial capacity, must be specially pleaded, except when the facts are authorised by act of parliament to be given in evidence under the plea of Not guilty by statute (ante, p. 508).

Pleas of leave and license.—If the defendant had the plaintiff's sanction or authority for the commission of the wrongful act or breach of duty of which he complains, he must plead a plea alleging that he did what is complained of by the plaintiff's leave.

(*p*) *Ashby* v. *Harris*, 2 M. & W. 673.
(*q*) *Pilkington* v. *Cooke*, 16 M. & W. 615.
(*r*) *Wrightup* v. *Greenacre*, 10 Q. B. 3.
(*s*) *Berton* v. *Lawrence*, 5 Exch. 816.
(*t*) *Holmes* v. *Sparkes*, 12 C. B. 251.
(*u*) Reg. Gen. Hil. Term, 16 Vict. c. 16; 1 Ell. & Bl. App. lxxxi. *Hodges* v. *Paterson*, 26 Law J., Exch. 223.
(*v*) Post, ch. 21, s. 1. *Traverse of the whole or part of a declaration.*
(*x*) Ante, pp. 308–310. *Howden* v. *Standish*, 6 C. B. 518. *Lewis* v. *Alcock*, 3 M. & W. 188. *Wright* v. *Lainson*, 2 ib. 739.

Pleas showing that the plaintiff is estopped by his own acts from complaining of the injury.—It is a good answer on the part of a sheriff or his officers to an action for false imprisonment, to plead that a writ of *ca. sa.* had issued, directing the defendant, a sheriff, to take one A. B., and that the plaintiff represented to the defendant that he, the plaintiff, was the said A. B., and that the defendant took him into custody upon the writ in consequence of his representation (*y*).

Pleas of justification must confess the assault or trespass, and set forth the facts and circumstances which justified it (ante, pp. 510, 513). A good justification for an assault and imprisonment is disclosed by a plea alleging that at the time when the trespass was committed the defendant was sheriff of a certain specified county, and in that character was presiding at an election of knights of the shire to serve for the county in parliament; that the plaintiff made a great noise and disturbance at the election, and molested and obstructed him in the execution of his duty, upon which he ordered a constable to take the plaintiff into custody, and to carry him before a justice of the peace, to be dealt with according to law (*z*).

Justification in the execution of legal process.—A sheriff who proceeds to justify an act of trespass in the execution of a writ, does enough if he sets forth the writ of execution in obedience to which he acted, unless, by taking an indemnity, he has so identified himself with the judgment-creditor as to place himself in the same position as the latter, in which case he must set forth and rely upon the judgment as well as upon the writ. If the plaintiff in the action, however, is not the execution-debtor, but a third party suing the sheriff, the latter must show not only the writ of execution but the judgment. Therefore, where the sheriff or his bailiff sets up a claim against a plaintiff, to goods taken in execution by him under a writ against a third party, the sheriff must show a judgment against such third party, and his production of the writ of execution alone is not sufficient (*a*); and the reason for this seems to be, because the party against whom the judgment has passed might have applied to set it aside if there were error attending it; and if he omit to do so, it is presumed, from his acquiescence, that the judgment is right (*b*). A plea of justification by a private person, who has gone with the sheriff's officer to make an arrest, or who has personally interfered in aid of the sheriff, must show the judgment as well as the writ; the officer, the writ and warrant only, unless he joins in pleading the other party, in which case he foregoes the benefit of his warrant (*c*). The stranger must set out

(*y*) *Dunston* v. *Paterson*, 26 Law J., C. P. 267.

(*z*) *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146.

(*a*) *White* v. *Morris*, 11 C. B. 1015; 21 Law J., C. P. 185.

(*b*) Bayley, J., *Doe* v. *Murlep*, 6 M. & S. 114.

(*c*) *Andrews* v. *Marris*, 1 Q. B. 17. *Turner* v. *Felgate*, 1 Lev. 95.

the proceedings at length if he justifies under them, and if he does not, the plea of the officers who join with him in his justification is bad (*d*). A plea of justification by a sheriff's officer should set forth the warrant under which he acted (*e*).

Process from inferior courts.— Formerly the process of an inferior court issued in a matter over which the court had no jurisdiction was an absolute nullity, and afforded no protection to those who had acted *bonâ fide* in the execution of it; but the law has been materially altered in this respect, and ample protection afforded, as we have seen (ante, pp. 575–577), to all county-court officers acting in the execution of county-court process, whether the court had jurisdiction in the matter or not, and also to officers of the Court of Bankruptcy (ante, p. 577), and constables and officers acting in the execution of warrants of justices (post, ch. 15).

Replications.— Where a man has abused an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority the plaintiff must reply the abuse (*f*). Replications to pleas justifying under process which has been set aside, usually allege that the writ under which the defendant attempts to justify was irregularly sued out of the said court of, &c., and that afterwards, by a certain order made by, &c., one of the judges, &c., bearing date, &c., and which order was afterwards made a rule of court, it was upon hearing, &c., and reading, &c., ordered that the said writ should be set aside for irregularity (*g*).

Evidence at the trial—Proof on the part of the plaintiff.— In actions against sheriffs for not arresting under a *ca. sa.*, or not making a levy under a *fi. fa.*, or for permitting an escape, the plaintiff must, as we have seen, prove a judgment in his favour (*h*), the issue of a writ thereon, and the delivery of the writ to the sheriff to be executed, if those facts are traversed and put in issue by the pleadings (ante, pp. 580, 581). The plaintiff must also prove the failure of the sheriff to make the arrest or the levy pursuant to the exigency of the writ, or to retain the judgment-debtor in his custody after he had arrested him (ante, p. 566), if the defendant denies the breach of duty by a plea of Not guilty. If it appears that the plaintiff has sued out void process, or that the judgment on which the process is founded is a void judgment, the plaintiff has no cause of action against the sheriff for neglecting to execute it, or for discharging a prisoner taken under it; but if the judgment is erroneous only, the sheriff cannot take advantage of the error (*i*).

(*d*) *Morse* v. *James*, Willes, 128.
(*e*) *Hewitt* v. *Macquire*, 7 Exch. 80. *Cotes* v. *Michill*, 3 Lev. 20.
(*f*) 1 Wms. Saund. 300 h.
(*g*) *Codrington* v. *Lloyd*, 8 Ad. & E. 449. *Jones* v. *Williams*, 8 M. & W. 357. *Rankin* v. *De Medina*, 2 D. & L. 813.
(*h*) *Jones* v. *Pope*, ante, p. 580.
(*i*) *Gold* v. *Strode*, Carth. 148. *Shirley* v. *Wright*, Cro. Jac. 775; Bull. N. P. 66.

Proof of judgments, writs, and process from the superior courts.— The usual mode of proving a judgment of a superior court is by an examined copy. The witness who produces the copy should prove that he examined it with the original record, and that the latter came from the proper custody (*k*). Writs and warrants, before they have been returned and have become matter of record, must be proved by the actual production of the instrument itself. Notice to produce the original writ, therefore, must in general be given to the sheriff, in an action against him, for a breach of duty in neglecting to obey it.

Delivery of the writ to the sheriff to be executed.— If a writ which has been delivered to the sheriff to be executed has been returned, and has become matter of record, the writ, and its delivery to the sheriff, may be proved by an examined copy of the record, without the production of the writ itself (*l*). If upon search the writ does not appear to have been returned, it will be presumed to be in the possession of the sheriff, and notice should be given to him to produce it; and if he fails to produce it at the trial, the plaintiff may produce and prove its contents by a copy, or by oral testimony, and show that it was delivered at the sheriff's office to be executed.

Proof that a party has acted as sheriff is *primâ facie* evidence of his being sheriff, without proof of his appointment (*m*).

Proof of the sheriff's having directed or authorised the commission of the wrongful act.— In order to charge the sheriff with the act of the bailiff, it is not enough, as we have seen, to show that the party doing the act was a sheriff's officer duly appointed, and apparently acting as the sheriff's officer, and that he had given a bond of indemnity to the sheriff. It must be shown that he had a special authority from the sheriff to do the particular act of which the plaintiff complains. For this purpose the officer should be called, upon a subpœna duces tecum, to produce the original warrant under which he acted, which being the best evidence of the fact no other can be admitted, unless it is improperly withheld after notice to produce it; in which case secondary evidence may be given of its contents (*n*). If the warrant has been returned by the officer to the under-sheriff, notice should be given to the latter, or to the attorney of the sheriff, to produce it, if the sheriff is still in office (*o*). If the defendant has gone out of office, and the warrant has been sent to the persons who acted as his London agents whilst he was in office, and who are also his attornies on the record, notice to them to produce the warrant is suffi-

(*k*) *Reid* v. *Margison*, 1 Campb. 469; post, ch. 20.

(*l*) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565.

(*m*) *Bunbury* v. *Matthews*, 1 C. & K. 380.

(*n*) *Drake* v. *Sikes*, 7 T. R. 113. *Minshull* v. *Lloyd*, 2 M. & W. 458.

(*o*) *Taplin* v. *Atty*, 3 Bing. 166.

cient to entitle the plaintiff to give secondary evidence of the contents of the warrant (*p*).

On production of the warrant bearing the sheriff's seal of office, it is right to presume that the seal was properly affixed, unless evidence to the contrary is adduced; and on production of the sealed warrant the plaintiff establishes a *primâ facie* case against the sheriff; and if the under-sheriff improperly issued it without having received a writ upon which it purports to be founded, the fact must be proved by the defendant as an answer to the plaintiff's case (*q*).

But the production of the warrant is not the only medium by which the privity of the sheriff with the act of the bailiff may be established. If the sheriff takes the fruits of an arrest made, or execution levied, by the officer, and ratifies and adopts the acts of the latter, he will have recognised him as his authorised agent in the particular transaction, and will be responsible accordingly (*r*). If it be proved that by the ordinary course of business in the under-sheriff's office the name of the officer who is to execute the writ is indorsed on the process, and the writ so endorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed upon it, and proves that the indorsement was made at the under-sheriff's office, or was made before it got there, and was afterwards adopted there, it will be *primâ facie* evidence that the person named in the indorsement was the person authorised by the sheriff to execute the writ, for if the warrant be granted to a different officer the sheriff has the means of proving it (*s*). But the mere production of the writ and indorsement, without proof that the indorsement was made in the sheriff's office, or adopted by the sheriff, will not be sufficient to implicate the sheriff (*t*).

If upon the pleadings the defendant, as sheriff, admits his participation in the act of the officer, it is of course unnecessary to produce and prove a warrant (*u*).

Evidence of negligence—Proof of false return to a writ.—The general duties and responsibilities of sheriffs and their officers have already been pointed out, and also the nature of the trespasses and injuries which are frequently committed by them in the execution of civil processes (ante, pp. 553–564). If it be proved that a debtor, whom the sheriff ought to have arrested in obedience to a writ lodged in his hands, did not abscond, but continued in the daily exercise of his usual occupation, or appeared publicly as usual, or was to be found at his home or his usual haunts, and

(*p*) *Suter* v. *Burrell*, 2 H. & N. 867.

(*q*) *Gibbins* v. *Phillips*, 7 B. & C. 535, note.

(*r*) *Martin* v. *Bell*, 1 Stark. 416. *Jones* v. *Wood*, 3 Campb. 228. *Woodgate* v. *Knatchbull*, 2 T. R. 155.

(*s*) *Scott* v. *Marshall*, 2 Cr. & Jerv. 242. *Tealby* v. *Gascoigne*, 2 Stark. 202.

(*t*) *Hill* v. *Sheriff of Mid.* 7 Taunt. 8.

(*u*) *Reed* v. *Thoyts*, 6 M. & W. 415.

the sheriff neglected to arrest him, and returned *non est inventus* to the writ, there will be abundant evidence of a false return (*x*).

When admissions by an under-sheriff and bailiffs are evidence against the sheriff.—The statements and declarations of an under-sheriff are no evidence to charge the sheriff, unless they accompany some official act, or unless they tend to charge himself, he being in truth the real party in the cause (*y*). What a bailiff says in a general conversation with any indifferent person, certainly is not evidence against the sheriff; but declarations made by him in the course of the execution of a writ to parties interested in making the inquiry, are evidence against the sheriff in the particular matter to which they relate (*z*).

Proof of the removal of goods taken in execution without paying the landlord's rent.—If the material facts of the tenancy, the rent in arrear, the seizure of the goods, the defendant's knowledge of the rent being in arrear, and the removal of the goods without payment of it, as set forth in the plaintiff's declaration, are traversed by the pleadings, the plaintiff must establish them in evidence by production and proof of a written demise, where the tenant holds under a writing (*a*), and by showing that a certain ascertained rent was payable and in arrear at the time of the levy, knowledge thereof on the part of the sheriff or his officer (*b*), and an actual removal of the goods without payment of the rent (*c*).

Evidence of the process under which the sheriff acted.—When the existence of the authority under which the sheriff acted is put in issue by the pleadings, it is in general enough, as we have seen, to prove the writ under which he acted. If the plaintiff, in order to prove his case against the sheriff, puts in evidence the warrant from the sheriff to his officer, he does not thereby make the recital in the warrant of the writ to the sheriff evidence for the latter of the writ, and dispense with the necessity of proof of it by the sheriff (*d*).

Proof of rent being in arrear at the time of the levy.—If the sheriff, in order to support a return of *nulla bona*, or to defend himself against an action for negligence in not levying under a writ of *fi. fa.*, is driven to show that rent was due to the landlord, the lease itself must be produced if it appear that there was a written demise (*e*). In an action against a sheriff for neglecting to levy under a *fi. fa.*, it is not enough for the sheriff to show that the landlord made a claim for a year's rent, which exceeded

(*x*) *Beckford* v. *Montague*, 2 Esp. 476. *Brown* v. *Jarvis*, 1 M. & W. 704. *Randell* v. *Wheble*, 10 Ad. & E. 719.

(*y*) *Snowball* v. *Goodricke*, 4 B. & Ad. 543.

(*z*) *North* v. *Miles*, 1 Campb. 390. *Jacobs* v. *Humphrey*, 2 Cr. & M. 414.

(*a*) *Augustien* v. *Challis*, 1 Exch. 279.

(*b*) *Riseley* v. *Ryle*, 11 M. & W. 16 *Hoskins* v. *Knight*, 1 M. & S. 245. *Saunders* v. *Musgrave*, 6 B. & C. 524. *Andrews* v. *Dixon*, 3 B. & Ald. 645.

(*c*) *Smallman* v. *Pollard*, 6 M. & Gr. 1001. *Wharton* v. *Naylor*, 12 Q. B. 679.

(*d*) *White* v. *Morris*, 11 C. B. 1033, overruling *Bessey* v. *Windham*, 6 Q. B. 166.

(*e*) *Augustien* v. *Challis*, 1 Exch. 279.

the value of the goods. The sheriff must prove that the rent was actually due. Where the sheriff relied upon an actual payment by him of rent claimed to be due to the landlord, Lord Ellenborough held, that if he had before him reasonable evidence of the rent being in arrear, and a sight of the lease, where the debtor held under a lease, there would be a *primâ facie* case in favour of the sheriff, and it would be for the plaintiff to show that the rent was not due (*f*). If the sheriff has given notice to the execution-creditor of the claim of rent, and the latter assents to the proceedings of the sheriff in respect thereof, he cannot of course afterwards turn round and complain of what he has himself sanctioned, although both he and the sheriff may have been deceived, or have acted under a misapprehension, or taken some erroneous view of the matter (*g*).

Evidence in an action for an escape.— If the sheriff relies upon a plea of leave and license in an action for an escape, he must show that he had the plaintiff's authority for the discharge of the prisoner in his custody. By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 126), it is enacted, as we have seen (ante, p. 567), that a written order under the hand of the attorney in the cause, by whom any writ of *ca. sa.* shall have been issued, shall justify the sheriff in discharging such party.

Proof of proceedings in the county court.— The statute 9 & 10 Vict. c. 95, s. 111, requires the clerk of every county court to cause a note of all plaints, judgments, orders, and proceedings in the court, to be fairly entered in a book to be kept at the office of the court, and the entries in this book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, are to be admitted in all courts as evidence of such entries, and of the proceedings, and of the regularity thereof, without any further proof.

Evidence in actions for trespasses committed under warrant of the Court of Bankruptcy.—The statute 12 & 13 Vict. c. 106, s. 234, provides that in any action other than an action brought by assignees of bankrupts, for a debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of, or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required at the trial of the petitioning creditor's debt, or of the trading or act of bankruptcy, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice, in writing, to such assignees or other persons that he intends to dispute some, and which, of such matters; and in case such notice shall have been given, if the assignees, or other person, prove the matter so disputed, or if the other party admit the same, the judge before whom

(*f*) *Keighley* v. *Birch*, 3 Campb. 523. (*g*) *Stuart* v. *Whittaker*, R. & M. 310.

the cause shall be tried may grant a certificate of such proof or admission, and the assignees, or other person, shall be entitled to the costs occasioned by the notice.

Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.—Whenever it has been proved that the sheriff owed a duty to the plaintiff, and that there has been a breach of that duty, nominal damages are recoverable, although there is no proof of any actual pecuniary damage having been sustained by the plaintiff. When a debtor has been taken in execution and lodged in gaol, the execution-creditor has a right to have him kept in gaol; if, therefore, the sheriff allows the debtor to go beyond the limits of the prison for ever so short a period, there is an infringement of the legal right of the execution-creditor, in respect of which damages are recoverable by him, though no actual damage be proved (*h*). Whenever a sheriff, having had a writ of execution put into his hands, unnecessarily delays putting it in force, and there is no proof of actual pecuniary damage from the delay, nominal damages are recoverable, for the plaintiff's right to have the body of his debtor detained has been invaded through the breach of duty by the sheriff. If actual loss has been sustained, the plaintiff will be entitled to recover the amount of such loss (*i*). And if the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the damages (*k*).

In an action against a sheriff for not selling the execution-debtor's share in chattels, in which he was jointly interested with another person, Lord Ellenborough said to the jury, "I cannot lay down any measure for your assessment of damages short of half the value. In giving any other you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, others might not regard the circumstance" (*l*).

In an action against a sheriff or his officer for the wrongful taking of goods, the plaintiff, if he recovers a verdict, is entitled to the full value of the goods. It is not competent to the sheriff to say as to part of it, "I have paid rent," for, being a wrong-doer, he had no right to take upon himself to apply the proceeds of the wrongful sale (*m*). Whenever a public officer has wrongfully seized and detained goods from the owner, the latter is entitled to recover all the loss resulting from the wrongful act, so that if the property detained has fallen in value in the market, the plaintiff is entitled to add the amount of that to the other damage he has sus-

(*h*) *Williams* v. *Mostyn*, 4 M. & W. 153.
(*i*) *Clifton* v. *Hooper*, 6 Q. B. 474.
(*k*) *Mason* v. *Paynter*, 1 Q. B. 974.
(*l*) *Tyler* v. *Duke of Leeds*, 2 Stark. 222.
(*m*) *White* v. *Binstead*, 13 C. B. 308; 22 Law J., C. P. 115.

tained (*n*). But if a sheriff takes goods in execution after an act of bankruptcy, and sells them, the jury may, in an action by the assignees for the unlawful taking, allow to the sheriff the expenses of the sale, if they think the assignees must have sold the goods if they had not been sold by the sheriff (*o*).

If a sheriff or his officer threatens to make a levy on goods which belong to the plaintiff, and the latter, in order to prevent his goods from being seized and sold, pays a sum of money to such sheriff or officer, he is entitled to recover back the money on proving that the sheriff had no right to make the levy or seize the goods he threatened to seize (*p*).

In actions for unlawfully removing goods without paying rent due to the landlord, the damages recoverable by the latter are not limited to the amount realised by the sheriff on the sale of the goods, but the landlord may recover the actual damage sustained by him by the sheriff's neglect of duty, whatever that may be (*q*).

Assessment of damages in actions for an escape.—"The true measure of damages," observes Jervis, C. J., "in actions against a sheriff for an escape (5 & 6 Vict. c. 98, s. 31), is the value of the custody of the debtor at the moment of the escape, and no deduction can be made therefrom on account of anything which the plaintiff might have obtained by diligence after the escape. At first sight this principle may appear to conflict with the rule which permits a recapture, upon fresh pursuit, before action brought to be pleaded in bar to an action for an escape on final process; because the circumstances of a debtor may greatly alter between his escape and his recapture. But the reason why a recapture is so pleadable removes this apparent conflict. The debtor is supposed never to have been out of custody, and the alteration in his circumstances is therefore immaterial.

"The damages to be paid by the sheriff must be assessed according to the circumstances of each particular case. If the execution-debtor had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small. If the execution-debtor had the means of satisfying the judgment at the moment of the escape, and has wasted those means since the escape, it is plain that the plaintiff has lost the chance of obtaining satisfaction of his judgment through the sheriff's neglect, and the jury would be justified in giving the full amount of the execution. It may be said that the plaintiff might, by diligence, have arrested the debtor before he had the opportunity of wasting his means; but so might the sheriff: he may retake a debtor upon fresh pursuit in any county, without

(*n*) *Barrow* v. *Arnaud*, 8 Q. B. 609.
(*o*) *Clark* v. *Nicholson*, 6 C. & P. 712; 1 C. M. & R. 724.
(*p*) *Valpy* v. *Manley*, 1 C. B. 602.
(*q*) *Foster* v. *Hilton*, 1 Dowl. P. C. 38. *Calvert* v. *Joliffe*, 2 B. & Ad. 421.

an escape-warrant, and the fact of the writ being now returnable immediately will not prevent him from so doing: for the debtor who has wrongfully escaped cannot insist that he is not still in custody. The rule might be supposed to operate unjustly towards the sheriff where the execution-debtor has the means of paying the debt at the moment of the escape, and still continues notoriously in solvent circumstances. In this case the value of the custody was the amount of the debt, and the plaintiff will be entitled to recover substantial damages. It is true that the recovery of such damages will not satisfy the execution; and the debtor may be retaken by the plaintiff, for the debtor cannot take advantage of his own wrong and avail himself of the recovery against the sheriff. On the other hand, the sheriff is not damnified, for he may retake the debtor, or recover against him by action, the amount which he has been compelled to pay. If the *laches* of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled in every case to issue a fresh writ, and incur expense, to relieve himself to some extent from the consequences of the sheriff's negligence."

"It must not, however, be understood that the plaintiff's conduct can, under no circumstances, have a material bearing upon the damages. If he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages would be materially affected by such conduct" (*r*).

Special damages.—All special and extraordinary damage, which is the natural and direct result of the wrongful act of which the plaintiff complains, are recoverable by him if they are set forth and claimed in the declaration (*s*). The costs of setting aside a judgment for irregularity cannot be made the subject of special damage in an action against the plaintiff or his attorney for seizing the plaintiff's goods under colour of the irregular judgment, if such costs have been applied for, and refused by, the court on motion (*t*).

Exemplary damages.—Where trespasses of a serious nature have been committed by officers of the law under colour of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process "is calculated to lead to dangerous conflicts; and when it is proved to the satisfaction of a jury to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances that it is very difficult to discover any standard by which to measure the amount" (*u*); and the court will not interfere, on behalf of the sheriff or his officers, with the constitutional functions of the jury in assessing the damages, unless it

(*r*) *Arden* v. *Goodacre*, 11 C. B. 375.
(*s*) Ante, pp. 318, 480, 519; post, ch. 22.
(*t*) *Loton* v. *Devereux*, 3 B. & Ad. 345.
(*u*) *Duke of Brunswick* v. *Slowman*, 8 C. B. 331.

appears that the defendant making the application was not implicated in the aggravations justifying the amount of damages as against the sheriff (*x*).

Recovery of treble damages for extortion.—If the plaintiff, in an action against a sheriff for extortion, frames his declaration on the statute of Elizabeth (ante, pp. 569, 581) for the recovery of treble damages, the jury should be asked to assess the actual damage sustained, and the finding should be entered upon the record as the actual damage, so as to entitle the plaintiff to judgment for treble the amount found by the jury (*y*).

(*x*) *Gregory* v. *Cotterell*, 1 Ell. & Bl. 369; 22 Law J., Q. B. 217.

(*y*) Post, ch. 21, s. 1, DOUBLE AND TREBLE DAMAGES. *Buckle* v. *Bewes*, 4 B. & C. 154.

CHAPTER XV.

OF TRESPASSES AND INJURIES COMMITTED IN EXECUTION OF WARRANTS AND ORDERS OF JUSTICES—RESPONSIBILITY OF MAGISTRATES, CONSTABLES, AND THEIR ASSISTANTS, AND PARTIES SETTING THEM IN MOTION.

SECTION I.—*Of trespasses in the execution of warrants and orders of justices.*—Jurisdiction of justices — Liability of justices for misconduct—Search-warrants —Liability of justices acting without jurisdiction — Their exemption from actions where no objection was taken to their jurisdiction — Interested justices—Wrongful commitments—Summary convictions, orders, and adjudications — Unlawful proceedings without information — When complaint cannot be withdrawn—Ouster of jurisdiction by claim of title—By objection to the validity of church-rate—Exercise of discretionary power — Wrongful ministerial acts—Convictions upon by-laws — Of the drawing-up of convictions and orders—Disclosure of jurisdiction—Warrants of distress and commitment—Power of appeal—Execution of convictions and orders after notice of appeal—Statement of a case —Quashing of convictions and orders — Removal by certiorari — Proof of circumstances calling for interference —Amendment of orders, &c.—Habeas corpus.

SECTION II.—*Duties and responsibilities of constables.*— Breaking and entering dwelling-houses — Exemption of constables and their assistants from liability for acts done in obedience to a warrant — Excess of authority on the part of constables.

SECTION III.—*Remedies for wrongs done under colour of convictions and warrants of justices.*—Replevin of chattels distrained — Actions against justices for things done without jurisdiction, for malicious convictions, commitments, and distresses—Effect of the existence of a power of appeal—Vexatious actions— Setting aside actions — Limitation of actions — Notice of action — Tender of amends—Parties, pleadings, defences, and evidence — Damages recoverable.

SECTION I.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF WARRANTS AND ORDERS OF JUSTICES.

The executive power of the sovereign is partially delegated to justices of the peace, who have authority by law, within the limits of their respective counties, to administer justice by their warrant or mandate, addressed

to their constables, which warrant or mandate is a full protection to all who act under it; but if the authority is departed from or abused in any stage of the proceeding, and made an instrument of oppression to the injury of those against whom it is directed, the parties so abusing the authority will be regarded as having acted from the beginning under no legal authority, and will become what is termed trespassers *ab initio* (ante, p. 221).

Of the jurisdiction of justices of the peace.—The ancient conservators of the peace, the nature and extent of whose power and authority are now unknown, were formerly elected by the freeholders of the county; but since the reign of Edward III. they have been appointed by the crown. By the stat. 34 Edw. 3, c. 1, it is enacted, that in every county of England there shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and cause them to be imprisoned and duly punished according to the law and customs of the realm; and inform themselves of pillors and robbers who go wandering about and will not labour, and put them in prison, and take of all them that be not of good fame sufficient surety and mainprize of their good behaviour, and duly punish others; and hear and determine, at the king's suit, all manner of felonies and trespasses done in their several counties, according to the laws and customs of the realm. From this statute, therefore, it appears that justices of the peace were to be appointed by commission from the crown; that they were to have authority to hold a court, and were to be judges of a court of record. Courts consequently were holden by them for hearing and determining offences within their cognizance; records were kept by them of their proceedings in these courts, and each justice named in the commission came to be called *custos rotulorum*, or keeper of the records and rolls of the county (*z*).

This power "to hear and determine," gave justices of the peace authority only to hear and determine through the medium of the common-law method of inquisition, before a jury and verdict of a jury, "for that is implied by law, and the court will adjudge as the law appoints, although it be not so expressed" (*a*). Hence, justices were under the necessity of holding sessions and assembling juries for the trial of all offences of which they had cognizance; and these sessions were by 36 Edw. 3, stat. 1, c. 12, commanded to be held at least four times a-year. Special sessions were afterwards directed to be held for executing certain statutes which the justices were charged to execute, and they were enjoined the diligent

(*z*) Holt, C. J., *Harcourt* v. *Fox*, 1 Show. 507.

(*a*) See the authorities cited in *Holland's* case, 4 Co. 74 a, 74 b.

perusal and study of these statutes at the Easter sessions in every year (*b*).

The power of summary conviction of offenders by justices without the intervention of a jury is entirely the creature of the statute law. No such power is accorded to them by the common law.

" In very early times such a power appears to have been conferred upon them in two cases, which seemed in their nature to require a speedy interference; but even in these it was confined to their own view:" these are the cases of forcible entries, 12 Ric. 2, c. 2, and of riots, 13 Hen. 4, c. 7; in the latter of which, it may be remarked, this extraordinary jurisdiction is carefully limited by the urgency of the occasion, by which alone, therefore, it was probably thought to be justified: for it is there directed, that if the rioters had departed before the arrival of the justices, so that the view could not be had, they are then to inquire of the matter, not by themselves, but by means of a jury, which they are specially directed in that case to summon. One other instance also occurs of a power to convict without jury, and that was on confession of the party, viz. by the act of 2 Hen. 5, st. 1, c. 4, relating to labourers, which authorised them to examine labourers, &c. on their oath, and on *their confession* to punish them *as if they were convict by inquest.* These two cases of view and confession seem to be the only clear instances in which justices of the peace were empowered in those early times to inflict punishment upon their own inquiry and judgment."

" The earliest statute upon which a summary conviction by a justice is on record, or of which a precedent is found in the books, is that of 33 Hen. 8, c. 6, against the practice of carrying dags or short guns. Lambard has given a precedent of a conviction upon this statute (*c*), and there appears to have been one removed into the Court of Queen's Bench by certiorari as early as the 43d year of Elizabeth, 1600; and this very case affords a proof of the objection, which, in the state of manners at that day, might well exist against relaxing the jealousy of the common law by intrusting anything like arbitrary authority in private hands " (*d*).

Until recently justices of the peace had no power to convict summarily for felony, but by 18 & 19 Vict. c. 126, power is given to justices of the peace assembled at petty sessions to hear and determine charges of larceny in a summary way, without the intervention of a jury, where the value of the property stolen does not in the judgment of such justices exceed 5*s.*, and the person charged consents to have the case heard and determined by such justices.

The form of the commission of the peace as it exists at present, is said

(*b*) 33 Hen. 8, c. 10.
(*c*) Lambard's Justice, p. 298.
(*d*) Introduction to Paley on Summary Convictions, pp. 6, 8.

to have been settled by the judges in the 33d year of Queen Elizabeth's reign (*e*). It assigns the several persons named in it, and every one of them jointly and severally, the queen's justices, to keep the peace in a particular county, and to cause to be kept all statutes made for the good of the peace and the quiet government of the people; and to punish all who offend against any of the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behaviour; and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it: also to inquire, upon the oath of good and lawful men of the county, of all felonies, trespasses, and offences, of which justices of the peace may lawfully inquire, &c. (*f*).

Besides the general authority confided to justices by the commission of the peace, they are clothed by various acts of parliament with a special and particular jurisdiction over particular offences, which jurisdiction must be exercised sometimes by one justice and sometimes by two; sometimes in their sessions, and sometimes out of their sessions. Whenever these statutory powers are exercised by justices, care must be taken that the special authority is strictly pursued.

Every single justice has regularly a jurisdiction for the preservation of the peace through the whole county by virtue of his commission, but the power of hearing and determining offences is by the commission given to two or more; and whenever a thing is required to be done by two justices, they must both be present at the execution of it. A justice has no power to do any judicial act out of his county, but he may do a merely ministerial act, such as the taking of an information (*g*).

A justice of the peace has jurisdiction to require sureties for good behaviour from persons charged with aggravated defamation, and with persisting in a continued course of libelling. Therefore, where a person persisted in writing libels upon a wall against a private individual, and was required to find sureties for his good behaviour, and in default was committed to prison, it was held that the justice had acted in a matter over which he had jurisdiction (*h*). If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti*, nor can the jurisdiction be ever held to depend upon the value or credibility of the evidence (*i*).

Jurisdiction of justices residing or being out of the county for which they

(*e*) 2 Hawk. P. C. c. 8, § 2.
(*f*) Dalt, J. P. Ch. 5.
(*g*) 2 Hale, P. C. 51.
(*h*) *Haylock* v. *Sparke*, 22 Law J., M. C. 72.
(*i*) *Cave* v. *Mountain*, 1 M. & Gr. 262.

are justices.—A justice of the peace for one county, riding, division, liberty, city, borough, or place may act for the same whilst residing, or being in an adjoining county, riding, &c., of which he is also a justice; and a justice of the peace for any county at large, riding, division, or liberty, may act as such within any city, town, or precinct next adjoining thereto, or surrounded thereby, being a county of itself, or otherwise having exclusive jurisdiction (*k*).

Jurisdiction of borough justices under the Municipal Corporation Act.—By s. 111 of 5 & 6 Wm. 4, c. 76, county justices have concurrent jurisdiction with borough justices in boroughs which have not received the grant of a separate court of quarter sessions.

All offences committed within any borough against the provisions of any local act of parliament are cognizable by the justices of the borough, and such justices possess all the powers and jurisdiction with respect to such offences which were formerly possessed by county justices (*l*). These, and all other offences punishable in boroughs upon summary conviction, must be prosecuted in conformity with the provisions of the statutes regulating the proceedings of justices (post, pp. 603–606); but the prosecution for the offence must be commenced within three calendar months (*m*), and any person who thinks himself aggrieved by the summary conviction may appeal to the court of quarter sessions for the borough or the county (*n*).

Liability of justices for misconduct in the exercise of their judicial functions.—A justice of the peace who acts corruptly in the discharge of the duties of his office, and uses the powers of the law for the purpose of injuring and oppressing those over whom he has authority, and gratifying his own private animosity, is responsible in damages to the parties injured; but it must be proved that he has acted wrongfully from personal motives of spite or ill-will, or, in legal parlance, that he "has acted maliciously, and without reasonable and probable cause," for he cannot be made responsible for an erroneous judgment, or for mere mistakes, or for ignorance, negligence, or misconduct, not amounting to an abuse of his authority (*o*).

Of the granting of search-warrants by magistrates.— Upon a representation to a magistrate that a person has reason to suspect that his property has been stolen and is concealed in some specified place, the magistrate may lawfully issue his warrant to search the place and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. If a warrant is issued without due

(*k*) 11 & 12 Vict. c. 42, c. 43, s. 6; 26 & 27 Vict. c. 77.
(*l*) 7 Wm. 4 & 1 Vict. c. 78, s. 31.
(*m*) 5 & 6 Wm. 4, c. 76, s. 127; 11 & 12 Vict. c. 43, s. 11.
(*n*) 5 & 6 Wm. 4, c. 76, s. 131.
(*o*) *Pease* v. *Chaytor*, 32 Law J., M. C. 121; post, s. 2.

authority on the part of the magistrate, and a house is entered and searched under it, that is a trespass on the part of a magistrate. And if a party goes before a magistrate and falsely and maliciously, and without reasonable and probable cause, makes such a representation to a magistrate as induces him to grant a search-warrant, the party so acting is responsible in damages in an action for a malicious prosecution (*p*). The power of a justice to grant a search-warrant is now extended to property in, or near, or with respect to which, any offence, punishable either upon indictment or summary conviction by virtue of the Criminal Law Consolidation Act (24 & 25 Vict. c. 96), has been committed (*q*).

Liability of justices for acts done by them without jurisdiction, or in excess of their jurisdiction.—If magistrates, while occupying the bench from which magisterial business is usually administered, publicly disseminate slanders under the pretence of giving advice, they are no more privileged than if they were illiterate mechanics assembled in an ale-house (*r*). If a magistrate convicts an accused person of an offence without having any jurisdiction in the matter, and then proceeds to sign and issue a warrant of commitment or distress, under which an imprisonment is effected or goods are seized, the conviction may be removed into the Court of Queen's Bench and quashed (post, *Certiorari*), and an action may then, and not before, be commenced against the magistrate (post, s. 2), to recover damages for the wrong done. Similar proceedings may be taken against him where he has exceeded his jurisdiction, and done more than he was authorised by law to do.

Exemption of justices from actions in cases where they had a primâ facie jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.—If, under the special powers of particular acts of parliament, justices have a *primâ facie* jurisdiction to inquire into and adjudicate upon certain matters that have been brought before them, and nothing appears, either on one side or the other, to show any want of jurisdiction, they are exempt from liability in respect of their proceedings in the matter (*s*). Thus, where an act of parliament gave certain magistrates a general jurisdiction over disputes between certain friendly societies and their members, excepting where the rules of the society contained an arbitration clause, and certain disputes were brought before a magistrate, who adjudicated thereon in ignorance of the existence of the arbitration clause in the rules of the society, which deprived him of jurisdiction, it was held that he was not responsible for his want of jurisdiction. "When a party," it was observed by the court, "relies on an exception from a general law,

(*p*) *Elsee* v. *Smith*, *Wyatt* v. *White*, ante, p. 527. 4 Inst. 177.

(*q*) 24 & 25 Vict. c. 96, s. 103.

(*r*) Ld. Campbell, *Lewis* v. *Levy*, Ell. Bl. & Ell. 554; 27 Law J., Q. B. 282.

(*s*) *Calder* v. *Halkett*, 3 Moore, P. C. C. 68. *Pease* v. *Chaytor*, 32 Law J., M. C., 121.

the burthen is on him to show that his case falls within the exception; and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he had any jurisdiction or not: but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction" (*t*).

So, if a person be exempted from serving a particular office, and, on being called before a magistrate to show cause why he refuses to do so, if he do not inform the magistrate of the particular ground of his exemption, he cannot maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal (*u*).

In a case that arose on the statute 20 Geo. 2, c. 19, giving magistrates jurisdiction to determine differences between masters and servants in husbandry, and other labourers respecting wages, it was held that an action of trespass would not lie against magistrates acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend. "The facts stated in the case," observes Lord Ellenborough, "are not stated as facts appearing before the magistrates at the time, and, in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear; for how, otherwise, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were facts whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement" (*x*)?

Wrongful proceedings by justices interested in the matter before them.—A justice of the peace ought never to execute his office in his own case, but cause the offender to be carried before some other justice. "And therefore the Mayor of Hereford was laid by the heels for sitting in judgment where he himself was the complainant, though, by the charter, he was the sole judge of the court" (*y*). But if a justice of the peace is assaulted, he may commit the offender for trial; or, if he be abused to his face in the execution of his office, he may commit the party until he finds sureties for his good behaviour (*z*).

If the magistrate himself begins a breach of the peace, he forfeits the protection of the law in the execution of his office (*a*).

(*t*) *Pike* v. *Carter*, 10 Moore, 376.
(*u*) Best, C. J. 10 Moore, 386.
(*x*) *Lowther* v. *Earl Radnor*, 8 East, 113.
(*y*) Per Holt, C. J., Anon. 1 Salk. 396. *Reg.* v. *Tyrone*, 12 Ir. C. L. R. 91.
(*z*) Dalt Just. c. 173. *R.* v. *Revel*, 1 Str. 420.
(*a*) *R.* v. *Symonds*, cas. temp. Hardwicke, 240.

Wrongful commitment and imprisonment by justices.—A magistrate is not at liberty to detain a known person to answer a charge not yet made against him; he ought to have an information regularly before him (post, p. 602), that he may be able to judge whether it charges any offence to which the party ought to answer. It may be otherwise in the case of a mere vagabond, who, if he were once allowed to depart from the presence of the magistrate, would, probably, never be seen again (*b*).

In an action against a magistrate for an assault and false imprisonment, it appeared that the plaintiff had been summoned, and had appeared before the magistrate to answer a complaint of having unlawfully killed a dog; that the magistrate proposed an arrangement which was rejected by the plaintiff, upon which the magistrate told him that, unless he paid a certain sum of money, he should convict him in a penalty of that amount, and commit him to prison; and then called in a constable, and ordered him to take the plaintiff outside, and if the matter was not settled to bring him in again, when he would proceed to commit him; and the plaintiff then went out with the constable and settled the affair by paying a sum of money: it was held that the magistrate was guilty of an assault and false imprisonment, and was responsible in damages, as there was no evidence of any conviction, and he had no right to give the plaintiff into the hands of a constable, in order to drive him into a settlement of the complaint (*c*).

When constables have arrested a man, and are taking him before a magistrate for the purpose of inquiring into a charge, it is not competent for a magistrate who meets them in the street to order the constables to take the man back to gaol, and keep him in prison. "It is a magistrate's duty," observes Patteson, J., "on all occasions, either to examine into a charge, or, if there is a reason why he cannot examine into it, he is not to interfere at all, and he should let the constable take the party before some other magistrate. It would be a very fearful thing, indeed, if any magistrate is at liberty, meeting a man in custody of the constables in the street, to say, 'Take him back for twenty-four hours, and bring him up to-morrow'" (*d*).

Of the form of commitment.—A commitment by way of punishment, by word of mouth only, without warrant in writing, cannot be supported (*e*). The commitment should be in writing, under the hand and seal of the justice by whom it is made, and should set forth his office and authority on the face of it, and the time and place at which it is made; also the cause of the commitment, and the period of the imprisonment. A commitment for an indefinite period cannot be supported (*f*). It need not be

(*b*) Per Ld. Tenterden, C. J., *Rex* v. *Birnie*, 1 Mood. & R. 160; 5 C. & P. 206.

(*c*) *Bridgett* v. *Coyney*, 1 M. & R. 215.

(*d*) *Edwards* v. *Ferris*, 7 C. & P. 542.

(*e*) *Mayhew* v. *Locke*, 7 Taunt. 69.

(*f*) *Prickett* v. *Gratrix*, 8 Q. B. 1029.

immediately made out; the detention of the party during the time necessarily required to make it out would be justifiable, but it should be made out as soon as possible. A commitment is in no respect like a conviction, which is only an entering on parchment the proceedings of a court which have already taken place, like recording a judgment (*g*).

Acts of a justice of the peace who has not duly qualified are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. Many persons acting as justices of the peace in virtue of offices of corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons are void, yet acts done by them as justices, or in a judicial character, have in no one instance been thought invalid (*h*).

Commitment by justices of accused persons for trial — Examination of the witnesses.— By 11 & 12 Vict. c. 42, s. 17, it is enacted, that in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offence, the justice, before he commits the accused person for trial, or admits him to bail, shall, in the presence of such accused person, who is to be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and also by the justice or justices taking the same, and shall afterwards be delivered (s. 20) to the proper officer of the court in which the trial is to be had; and before the first sitting of the court at which the person committed or bailed is to be tried, such person shall be entitled (s. 27) to have, from the officer or person having custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum. If the depositions when taken contain no charge of any indictable offence, oral evidence given before the justice, but not contained in the depositions, cannot be brought in aid of the depositions, to support the proceedings of the magistrate, and establish a valid information and the requisite jurisdiction (*i*).

Effect of the depositions being taken in the absence of the magistrate who acts upon them.— Every magistrate taking the depositions on oath of the party making the charge has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given, and to determine in many cases whether bail can or shall be taken.

(*g*) *Hutchinson* v. *Lowndes*, 4 B. & Ad. 121. *Leary* v. *Patrick*, 15 Q. B. 274.

(*h*) *The Margate Pier Company* v *Hannam*, 3 B. & Ald. 271.

(*i*) *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 185.

If, therefore, the depositions are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction: there is no proper charge before him, and if he directs the imprisonment of the person accused by them he is responsible for a trespass (*k*).

The magistrate is not answerable for the correctness of the charge, or for any erroneous judgment of his own upon the facts. "The only question is, whether the magistrate had jurisdiction to investigate and commit" (*l*).

Statutory forms of warrants of commitment are given by 11 & 12 Vict. c. 42, and it is enacted (ss. 9, 10), that no objection shall be taken or allowed to any summons or warrant against a party accused for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice who has taken the examination of the witnesses; but if any such variance shall appear to the justice to have deceived or misled the accused, the justice, at the request of the party charged, may adjourn the hearing to some future day, and in the meantime remand the accused, or admit him to bail.

Convictions by magistrates on their own view.—A conviction before a justice or justices of the peace, without the intervention of a jury, is always, as we have seen, under some statute, the common law sanctioning no such proceeding. It is regarded by the courts with no particular favour, and it is necessary that the justice should, on the record of it, show that he has proceeded *recto ordine* (*m*). In some cases, and under particular acts of parliament, a summary remedy is provided, as we have seen, for particular offences, by enabling a magistrate to convict and punish upon his own view of the commission of the offence, without making any inquiry upon oath or taking any information (*n*). The record of the proceedings in such cases need only set forth such circumstances as were necessary to give the magistrate jurisdiction, and show that he pursued the directions of the statute (*o*).

Summary convictions founded upon informations.—When the magistrate has not been authorised by statute to act upon his own view, he must have some information or complaint before him in order to give him jurisdiction in the matter. He may have jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case over a particular individual, there must be a proper charge or information before him (*p*). If, therefore, he grants a warrant against a person upon a sup-

(*k*) *Caudle* v. *Seymour*, 1 Q. B. 892.

(*l*) *Mills* v. *Collett*, 6 Bing. 92. *Windham* v. *Clere*, Cro. Eliz. 130; 1 Leon. 187.

(*m*) 1 Smith's L. C., note to *Crepps* v. *Durden*.

(*n*) *Jones* v. *Owen*, 2 D. & R. 602.

(*o*) *Basten* v. *Carew*, 3 B. & C. 649.

(*p*) *Caudle* v. *Seymour*, 1 Q. B. 892.

posed charge of felony, without taking any deposition or information on oath, and the party is arrested under the warrant, this is a trespass, for which an action may forthwith be maintained against such justice for compensation in damages (*q*). So, if he makes an order for the removal of a pauper, without having before him a complaint by the parish officers of the chargeability of such pauper to the removing parish, he acts wholly without jurisdiction in the matter, and is a trespasser (*r*).

Statutory provisions respecting summary convictions and orders of justices. —By 11 & 12 Vict. c. 43, s. 1, it is enacted, that in all cases where an information shall be laid before one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place, that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice, &c., for which he is liable, upon summary conviction, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such justice, &c., upon which he has authority to make any order for payment of money, it shall be lawful for the justice, &c., to issue his summons, stating shortly the matter of the information and complaint, and requiring the accused party to appear and answer, and be further dealt with, in manner therein provided.

Requisites of the information or complaint.—By 11 & 12 Vict. c. 43, s. 8, it is enacted, that in all cases of complaints upon which a justice of the peace may make an order for the payment of money or otherwise, it shall not be necessary for the complaint to be in writing, unless it shall be required to be so by some particular act of parliament upon which it is framed; and (s. 10) that every complaint upon which a justice of the peace is authorised by law to make an order, and every information for any offence or act punishable upon summary conviction, unless some particular act of parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except in cases of informations, where the justice receiving the same shall thereupon issue his warrant in the first instance to apprehend the defendant; and in every such case the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness on his behalf, before any warrant shall be issued.

Every such complaint must be for one matter of complaint only, and every such information for one offence only, and every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney, or other person authorised in that behalf; and must disclose upon the face of it some offence, neglect, or default, into which the magistrate has authority to inquire, and respecting which he

(*q*) *Morgan* v. *Hughes*, 2 T. R. 225. (*r*) *Reg.* v. *Just. Bucks*, 3 Q. B. 807.

has jurisdiction to adjudicate (*s*). Provision is made (s. 4) for describing in the information or complaint partners, joint-tenants, parceners, or tenants-in-common, and their property; also the ownership of works and buildings maintained or repaired at the expense of any county, riding, division, &c., and of any materials for making, altering, or repairing the same, or repairing highways and turnpike-roads; also the ownership of goods provided by parish-officers for the use of the poor, and the property of Commissioners of Sewers.

When a warrant is intended to be issued on the strength of the information, the information must, in order to give the justice jurisdiction in the matter, disclose a complaint about something or other that the justice has authority to inquire into and adjudicate upon, and the facts necessary to show jurisdiction must be substantiated on oath. An information on oath laid before a magistrate, charging an offence within his cognizance, is sufficient to give the magistrate jurisdiction over the charge and the person charged, although the information does not disclose any legal evidence of the guilt of the prisoner, and states nothing beyond mere hearsay, upon which neither judges nor juries could properly act. The commitment by the magistrate of a party to gaol upon the strength of such an information amounts at the utmost to no more than an error in judgment on the part of the magistrate, for which a magistrate, if acting within his jurisdiction, is not liable (*t*). But the information must impute a criminal offence within the jurisdiction of the magistrate, and not a mere civil wrong in respect of which he has no jurisdiction (*u*).

Of the time within which the information or complaint must be laid.—By 11 & 12 Vict. c. 43, s. 11, it is enacted, that in all cases where no time is specially limited for making any complaint or laying any information, the complaint or information shall be laid within six calendar months from the time when the matter of such complaint or information arose. This limitation as to time being entirely distinct from the enactment creating the offence, and there being a *primâ facie* jurisdiction, until it is shown that the period of limitation had expired at the time of the laying of the information, the limitation need not be noticed, and it need not be shown on the face of the proceedings that they had been originated within the appointed period. "All that is matter of defence, and need not be noticed in the conviction" (*x*).

Proceedings upon information or complaint.—By the same statute, provision is made for the service of the summons and proof of service thereof, and (s. 2) for the issue of a warrant for the apprehension of the party summoned in case of his non-appearance, according to the exigency

(*s*) *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 185. *Reg.* v. *Scotton*, 5 Q. B. 499. *Perham, in re*, 5 H. & N. 30.

(*t*) *Cave* v. *Mountain*, 1 M. & Gr. 257.

(*u*) *Lawrenson* v. *Hill*, ante.

(*x*) *Wray* v. *Toke*, 12 Q. B. 507.

of the summons ; and also for the issue, in the first instance, in certain cases, of a warrant for apprehending the person against whom the information has been laid, and bringing him up to answer thereto, and to be dealt with according to law.

Commitment of witnesses for non-attendance, or refusing to be sworn or to give evidence.—By 11 & 12 Vict. c. 42, s. 16, and 11 & 12 Vict. c. 43, s. 7, it is further enacted, that if it shall be made to appear to any justice, by the oath or affirmation of a credible person, that any one within the jurisdiction of the justice is likely to give material evidence, and will not voluntarily appear to be examined, such justice is authorised and required to issue his summons to such person in a form specified, requiring him to appear and give evidence at an appointed time and place ; and if the person summoned neglects to appear, and no just excuse is offered for his non-appearance, then, after proof on oath or affirmation of service of the summons as therein mentioned, and that a reasonable sum was paid or tendered to the witness for his costs and expenses, it shall be lawful for the justice to issue a warrant to bring up such person to be examined ; or if the justice shall be satisfied, by evidence upon oath or affirmation, that it is probable that such person will not attend to give evidence without being compelled to do so, then, instead of issuing a summons, it shall be lawful for the justice to issue his warrant in the first instance ; and if, on the appearance of such person, either in obedience to a summons or in custody on the warrant, he shall refuse to be examined on oath or affirmation, or to give evidence, without offering any just excuse for his refusal, any justice of the peace then present, and having there jurisdiction, may by warrant commit the person so refusing to the common gaol or house of correction for any time not exceeding seven days, unless he shall in the meantime consent to be examined and to answer concerning the premises.

Apprehension of parties neglecting to appear.—Power is given to justices under various statutes to issue warrants for the apprehension of parties who have been duly summoned to appear before them, and have failed to appear according to the exigency of the summons (*y*).

Of the hearing of complaints and informations.—By 11 & 12 Vict. c. 43, s. 12, it is further enacted, that every complaint and information shall be heard and determined by one or more justice or justices, as shall be directed by the act of parliament upon which the complaint or information shall be framed; and if there be no direction in any act of parliament, then the complaint may be heard and determined by one justice for the county, riding, division, liberty, city, borough, or place, where the matter of the information shall have arisen. Also (s. 2), that where a party summoned has failed to appear, it shall be lawful for such justice or

(*y*) 24 & 25 Vict. c. 97, s. 62; 11 & 12 Vict. c. 43, s. 13.

justices, on proof upon oath of the due service of the summons, to proceed *ex parte* to the hearing of such information or complaint, and to adjudicate thereon. If the complainant himself does not appear in person, or by counsel or attorney, the complaint or information must be dismissed or the hearing adjourned. If the defendant, being personally present before the justice, admits the truth of the information or complaint (s. 14), and shows no sufficient cause why he should not be convicted or an order made against him, then the justice or justices present at the hearing are to convict him or make an order: but if he do not admit the truth of the information or complaint, then the hearing and examination of the prosecutor or the complainant and his witnesses are to be proceeded with in the manner therein provided.

Every prosecutor of an information, not having any pecuniary interest in the result, and every complainant in any such complaint, whatever his interest may be in the result of the same, is a competent witness (s. 15) to support the information or complaint. And it is provided (s. 14), that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he would have advantage of the same.

Where the statute creating the offence directs the issue of a summons, and gives the party summoned a certain time to appear and plead, there will be a clear want of jurisdiction if the justices proceed to hear the complaint before the expiration of the full period allowed (*z*).

Variances between statements in the information and the evidence.—It is further enacted (11 & 12 Vict. c. 43, s. 9), that any variance between the information and the evidence adduced in support thereof, as to the time of the commission of the offence, shall not be deemed material, if it be proved that the information was in fact laid within the time limited by law for laying the same; and any variance between the information and the evidence adduced in support thereof, as to the parish or township in which the offence is alleged to have been committed, shall not be deemed material, provided that the offence be proved to have been committed within the jurisdiction of the justice by whom the information shall be heard and determined; and if any variance between the information and the evidence shall appear to the justice or justices present and acting at the hearing to be such that the party charged by the information has been thereby deceived or misled, it shall be lawful for the justice to adjourn the hearing of the case, and in the meantime commit the defendant to prison, or discharge him upon his entering into a recognizance for his appearance at the adjourned hearing.

(*z*) *Mitchell* v. *Foster*, 12 Ad. & E. 475.

There must be some evidence before the magistrate of the commission of the particular offence charged in the information or complaint in order to justify a conviction upon it (*a*).

If a person is summoned before a magistrate, and appears to answer the charge stated in the summons, he cannot be lawfully convicted on a totally different charge; nor, if the evidence fails to substantiate the particular charge specified in the summons, can the summons be altered or amended so as to alter the nature of the offence originally charged, and to answer which the party has appeared (*b*). Magistrates cannot give themselves jurisdiction by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offence, for the purpose of giving themselves jurisdiction (*c*). Every accused party must of course be heard in his own defence before he can lawfully be convicted (*d*).

If the depositions on oath of the party making the charge are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate convicts upon depositions so taken, he acts, as we have seen (ante, p. 601), entirely without jurisdiction, as there is no proper charge or complaint before him.

Unlawful proceedings of justices when there is no information or complaint before them.—Magistrates have no jurisdiction to convict summarily and impose a fine for an assault, when it is an established fact that a complainant before them does not complain of the assault, and does not intend to give them jurisdiction to deal with it. Therefore, where a person who had been assaulted went before magistrates to bind over the assaulting party to keep the peace, and the magistrates, finding that an assault had been committed, proceeded to deal with the assault by summary conviction, notwithstanding a protest by the complainant against their deciding on the assault, it was held that the justices had acted without any jurisdiction in the matter, the assault not having been brought before them with a view to their adjudicating upon it, and a rule for a certiorari (post), to remove and quash the conviction was made absolute, in order that the conviction might be no bar to ulterior proceedings by indictment or by action (*e*).

When a complaint once made cannot be settled and withdrawn.—Where, however, a complaint of any crime or misdemeanour, or other statutory offence, has been duly laid before a magistrate, it does not rest with the complainant himself to abandon the charge, or to proceed further with the

(*a*) *Kirkin* v. *Jenkins*, 32 Law J., M. C. 141. *Sherborn* v. *Wells*, 2 N. R. (1863), 69. *Evans* v. *Botterill*, ib. 70.

(*b*) *Martin* v. *Pridgeon*, Ell. & Ell. 778; 28 Law J., M. C. 179; 33 Law T. R. 119.

(*c*) *Thompson, in re*, 6 H. & N. 193; 30 Law J., M. C. 19.

(*d*) *Cooper* v. *Wandsworth Board, &c.*, 32 Law J., C. P. 185; post, ch. 23.

(*e*) *Reg.* v. *Deny*, 20 Law J., M. C. 189; 2 L. M. & P. 230.

prosecution. Thus, where a complaint of an assault was duly laid before justices, and a summons issued for the appearance of the defendant, and the defendant went and settled the matter with the complainant by paying him a sum of money, and the complainant told one of the justices that the affair was settled, and that he did not intend to prosecute, but the justices nevertheless issued warrants for the apprehension of the parties (ante, p. 605), and compelled the complainant under the exigency of a warrant to appear and give evidence (ante, p. 605), and then convicted the defendants, it was held that the justices had not exceeded their authority, for the original complaint gave them jurisdiction in the matter; and the complaint, having been made before them, they were justified in exercising all the powers vested in them by law for the purpose of enabling them to investigate it, and adjudicate upon it; and that it was not competent to the complainant to deprive them of jurisdiction by settling the matter with the accused party (*f*).

Convictions by justices in excess of their jurisdiction.—Where the nature of the offence is such that it can only be committed once on the same day by the same person, and the magistrate proceeds to hear and convict, he is *functus officio*, and has no power to entertain or adjudicate upon a charge of a second offence on the same day by the same person. Thus, where a magistrate convicted a baker in four separate penalties for exercising his ordinary calling by baking rolls on a Sunday, and there were four separate convictions for selling four rolls, upon which the magistrate issued four distress-warrants, it was held that the magistrate, after he had convicted the baker in the first penalty, had no jurisdiction to convict him again for the same offence on the same day. "The act of parliament," observes Lord Mansfield, "gives authority to the justice to punish a man for exercising his ordinary calling on a Sunday. The justice exercises his jurisdiction by convicting him in the penalty for so doing. But then he has proceeded to convict him for three other similar offences on the same day. Now, if there are four convictions for one and the same offence, committed on one and the same day, three of them must necessarily be bad" (*g*).

Ouster of the jurisdiction of justices by setting up a claim of title.—Whenever a criminal statute authorises justices to punish trespasses on land, a wilful intended trespass is intended, and not an entry on land in the *bonâ-fide* assertion of some supposed right or title. Whenever, therefore, in summary proceedings before magistrates, a *bonâ-fide* claim of title to real property, or to the possession of some incorporeal right or privilege over land, is set up before justices by a defendant in answer to some complaint of trespass, the jurisdiction of the justices in the matter is ousted, and

(*f*) *Reg.* v. *Hawkins*, 2 N. R., Q. B. 62. (*g*) *Crepps* v. *Durden*, Cowp. 645.

the information or complaint ought to be dismissed (*h*). But the complaint ought not to be dismissed on the strength of the mere assertion of the claim, for it is the duty of the justices to inquire into the circumstances, and ascertain whether there is any plausible or colourable ground for the claim, and whether the act was done in the *bonâ-fide* exercise of what the defendant supposed to be his right in the matter (*i*). The mere belief of the party himself that he has the right he asserts is not sufficient, under the Trespass in Pursuance of Game Act (1 & 2 Wm. 4, c. 32, s. 30), to oust the justices of their jurisdiction, as it might under the Malicious Trespass Act (*k*).

Upon a question of highway arising before justices under the Highway Act, no matter of title comes in question, although the information or complaint is laid against the owner of the land who disputes the existence of a highway across his land (*l*).

The jurisdiction of justices, under the statute 1 & 2 Vict. c. 74, for facilitating the recovery of possession, by landlords, of premises held over by tenants, after the due determination of their tenancy, cannot be ousted by the tenant's setting up the title of some third party, under whom he claims to hold, for as soon as the tenancy is proved to the satisfaction of the justice, the tenant is estopped from disputing the title of his landlord, and no question of title can be raised between them (*m*).

Justices cannot, of course, give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which their jurisdiction depends (*n*). And whenever a question of title is raised before them, and there is fair and reasonable evidence in support of it, the justices ought not to proceed, for they cannot themselves decide whether the claim is well or ill-founded, or has no foundation in law; and they ought not to disregard it unless it is obviously frivolous. Whenever a real question is raised between the parties as to the right, the justices ought not to convict (*o*).

Ouster of jurisdiction of justices by objection to the validity of a church-rate.—The jurisdiction of justices in enforcing payment of church-rates is given for the first time by 53 Geo. 3, c. 127, s. 7, but in the same section it is provided, that if the validity of the rate, or the liability to pay it, be disputed, and the party disputing give notice thereof to the justices, the justices

(*h*) *Reg.* v. *Cridland*, 7 Ell. & Bl. 867; 27 Law J., M. C. 28. *R.* v. *Burnaby*, 2 Ld. Raym. 900.

(*i*) *Reg.* v. *Dodson*, 9 Ad. & E. 712. *Morden* v. *Porter*, 8 W. R. 202. *Reg.* v. *Cridland*, ut sup. *Legg* v. *Pardoe*, 30 Law J., M. C. 108. *Leatt* v. *Vine*, ib. 207. *Eversfield* v. *Newman*, 4 C. B., N. S. 418.

(*k*) *Cornwell* v. *Sanders*, 32 Law J., M. C. 6.

(*l*) *Williams* v. *Adams*, 31 Law J., M. C. 109.

(*m*) *Rees* v. *Davies*, 4 C. B., N. S. 56; ante, p. 450.

(*n*) *Reg.* v. *Nunneley*, 27 Law J., M. C. 261.

(*o*) *Reg.* v. *Stimpson*, 32 Law J., M. C. 209.

shall forbear giving judgment thereupon, and the person demanding payment may proceed in due course of law for the recovery of the rate (*p*). When, therefore, on an application to justices to enforce payment of a church-rate by the issue of a warrant, the party proceeded against for non-payment *bonâ fide* disputes the validity of the rate, and his liability to pay, the justices have no jurisdiction to proceed further in the matter (*q*). But the objection and notice thereof must be given *bonâ fide*, and the defendant must bring forward some legal objection to the rate, or some reasonable ground for disputing his liability; for if the justices are of opinion that his objections are frivolous, and there is evidence to justify them in that finding, they may issue their distress-warrant to enforce payment of the rate (*r*). If there are facts before the justices tending to show that the objection is not *bonâ fide*, the justices are not responsible for an erroneous judgment upon those facts, but there must be some reasonable ground before them to warrant them in coming to that conclusion; if there is no such evidence, they act wholly without jurisdiction, and may become liable in trespass for their acts (*s*).

Whenever the defendant, however, submits his case and objections to the decision of the magistrates, and invites them to decide upon them, and makes no objection to their jurisdiction until after they have heard and adjudicated, he is estopped from afterwards objecting to their decision, and the proceedings taken thereon (*t*).

To what extent a justice of the peace is protected in the exercise of a discretionary power.—By 11 & 12 Vict. c. 44, s. 4, it is enacted, that in all cases where a discretionary power shall be given to a justice of the peace by any act of parliament, no action shall be brought against such justice for, or by reason of, the manner in which he shall have exercised his discretion in the execution of any such power. But for the justice to secure his exemption under this section, it is essential that he should be clothed with a legal authority to do the act concerning which he exercises his discretion. If he has no jurisdiction in the matter, he has no valid discretionary power, and is not within the exemption. The magistrate, moreover, must be acting judicially in the exercise of his discretion, for if he is merely determining upon the propriety or expediency of performing some mere ministerial function, and makes a wrong exercise of his discretion by doing what he has no legal authority to do, he cannot claim the statutory exemption.

Where magistrates, for example, exercise their discretion as to the

(*p*) *Backhouse* v. *Bishopwearmouth Churchwardens*, 9 C. B., N. S. 315.

(*q*) *Mannering, ex parte*, 31 Law J., M. C. 153.

(*r*) *Reg.* v. *Blackburn*, 32 Law J., M. C. 41. *Pease* v. *Chaytor*, ib. 121.

(*s*) *Pease* v. *Chaytor*, 1 B. & S. 658; 31 Law J., M. C. 1; 32 ib. 121; post, p. 2.

(*t*) *Reg.* v. *Salop*, 29 Law J., M. C. 39.

granting or withholding a distress-warrant to enforce payment of a rate, the existence of a valid rate, and a legal liability to pay on the part of the party distrained upon, are essential to the magistrate's exemption from liability, unless the rate is a poor-rate, and they can shelter themselves under that part of s. 4 of 11 & 12 Vict. c. 44, which expressly exempts justices from actions in respect of the issue of warrants of distress for poor-rate against persons not liable to pay the rate (post, p. 619) (*u*).

So, when the discretion exercised by the magistrate respects the issuing of a distress-warrant to enforce the payment of money ordered to be paid by some third party, the validity of the order, and the legal liability to pay the money, are a preliminary condition to the magistrate's having any authority to act at all in the matter (*x*).

Hearings and decisions by magistrates not being of a judicial character.—*Wrongful ministerial acts* by magistrates may render them liable to an action of trespass, although they may have had the power of hearing and determining on the facts necessary to empower them to do the ministerial act, and have exercised their judgment upon such facts prior to the performance of the ministerial act. Thus, where an act of parliament (24 Geo. 2, c. 44, s. 13), empowered the owners, occupiers, &c., of abbey-lands to make a rate for certain purposes upon the owners of such lands, and provided (s. 15) that if any owner who had been rated should neglect or refuse to pay the rate after demand, then, upon proof thereof before a justice, the same should be levied by distress, the defaulter having been first duly summoned to appear and show cause for his neglect or refusal, and the plaintiff being rated, and refusing to pay, was summoned before the defendant, and denied his liability, but failed to show cause for his refusal to the satisfaction of the defendant, who issued a distress-warrant, under which the plaintiff's goods were seized, and the plaintiff then brought his action for a wrongful seizure, and proved that his land was not abbey-land, and that he was not liable to be rated, and recovered damages, it was held that the defendant could not shelter himself from liability on the ground that he was acting judicially when inquiring into, and determining upon, the facts made preliminary to the issue of the warrant.

The statute, it was observed, gave the defendant no power to try the question of the plaintiff's claim from exemption from the rate, on the ground that his land was not abbey-land, or to inquire into the validity of the rate, or to adjudicate upon the liability to pay. He was directed to begin by inquiring whether the rated owner had refused to pay, not whether the rate was valid, and his inquiry and determination had refer-

(*u*) *Pedley* v. *Davis*, 30 Law J., C. P. 378.

(*x*) *Newbould* v. *Coltman*, 6 Exch. 201; 20 Law J., M. C. 149; ante, p. 547.

ence to the discharge of a mere ministerial function, and were not of a judicial character (*y*).

So, where an act of parliament, 2 & 3 Vict. c. 84, s. 11, provided that, when any contribution from overseers of monies required by a board of guardians should be in arrear, it should be lawful for justices, on application under the hand of the chairman, to summon the overseers to show cause why such contribution had not been paid, and, after having heard the complaint, &c., to issue, if the justices should think fit, their distress-warrant for the recovery of such contribution, and a chairman and guardians made an order upon overseers for contribution, and the order being disobeyed, the justices issued their summons, grounded on an information setting forth the order and the non-payment, and calling on the overseers to appear and answer, &c., and the case was heard, and a distress-warrant issued, and the overseers brought an action of trespass against the justices for breaking and entering their houses, and seizing their goods, it was held that, as the statute did not require any conviction, or order, or act of adjudication at all, but simply a warrant of distress for the levying of the sums legally due, the justices, in hearing and deciding upon the facts which were to guide them in the exercise of their discretion as to the issue or refusal of the warrant, were not acting in the discharge of any judicial functions, but were exercising their discretion respecting the performance of a mere ministerial duty, and that a valid order from the board of guardians, and a legal liability to pay on the part of the overseers, were essential to give the magistrates jurisdiction to act at all in the matter (*z*).

Convictions upon by-laws.—If a corporation or a local board exceeded their powers in making a by-law, a justice exceeds his power in convicting upon it; and the allowance of the by-law by the Secretary of State does not prevent the Court of Queen's Bench from granting a certiorari for the purpose of bringing up and quashing the conviction (*a*). If the validity of a by-law, and the jurisdiction of a justice to convict upon it, depend upon the existence or non-existence of a particular fact, the justice cannot give himself jurisdiction by finding the existence of the fact, unless there is reasonable evidence before him to support his finding. It is open to the party convicted to show by affidavit that there was no evidence before the justice on which he was warranted in coming to the conclusion that the by-law was valid, and that he had authority to enforce it, because it shows that the justice has exceeded his jurisdiction (*b*). And if, upon the facts proved before the justice, and the circumstances under which the conviction took place, it appears either that the justice did not deter-

(*y*) *Pedley* v. *Davis*, 30 Law J., C. P. 378. *May, ex parte*, 2 B. & S. 426; 31 Law J., M. C. 191. *Reg.* v. *Higginson*, 8 Jur. N. S. 1176. *Pease* v. *Chaytor*, 1 B. & S. 670; 8 Jur. N. S. 482.

(*z*) *Newbould* v. *Coltman*, 6 Exch. 189; 20 Law J., M. C. 149.

(*a*) *Reg.* v. *Wood*, 5 Ell. & Bl. 49.

(*b*) *Bailey's* case, 3 Ell. & Bl. 618. *Reg.* v. *Dickenson*, 26 Law J., M. C. 204.

mine upon the validity of the by-law, but thought himself bound to enforce it whether valid or invalid, and the by-law is invalid, or if it appears that the justice came to a wrong conclusion in point of law in determining that the facts before him gave him jurisdiction, the court will correct his mistake and quash the conviction, for "the magistrate has no power to hear at all, or to convict, except in the case of a valid by-law" (*c*). But if there are facts before the justice warranting him in coming to the conclusion that he had jurisdiction in the matter, and he adjudicates accordingly, his decision cannot be impugned on the ground that there were other facts before him from which he ought to have drawn a contrary conclusion (*d*).

Of the drawing-up of convictions and orders.—If the justice or justices convict or make an order against the defendant, a minute or memorandum thereof must then be made (s. 14), and the conviction or order afterwards be drawn up in form, and lodged with the clerk of the peace, to be filed among the records of the quarter sessions. The conviction may be drawn up in form at a future time, after it has been acted upon, and may then be exhibited to authenticate the proceeding and protect the magistrate (*e*). The conviction must be of the specific offence charged in the information. If it is a conviction for another and different offence, it cannot be supported (*f*). The commitment and conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and different offence (*g*).

Disclosure of the authority and jurisdiction of justices on the face of their proceedings.—"In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions or inquisitions, ought, according to the course of the decisions, to show their authority on the face of them, by direct averment or reasonable intendment. Not so the process of the superior courts, acting by the authority of the common law" (*h*). Every order of justices, therefore, should show on the face of it a complaint and an adjudication thereon (*i*). "I think," observes Coleridge, J., "that the rule is a good rule, and that it is right that the jurisdiction of a judge with limited powers should be shown upon the face of his proceedings; and if this is not done, it would not be known that the matter was *coram non judice*, and it is not fitting that jurisdiction should be established one way or the other by parol evidence" (*k*).

(*c*) Campbell, C. J. & Crompton, J., *Reg.* v. *Wood*, 5 Ell. & Bl. 57, 58.

(*d*) *Bailey's* case, ante, p. 612.

(*e*) *Massey* v. *Johnston*, 12 East, 81.

(*f*) *Kirkin* v. *Jenkins*, 32 Law J., M. C. 141.

(*g*) *Rogers* v. *Jones*, 3 B. & C. 412. *Martin* v. *Pridgeon*, ante, p. 607.

(*h*) Per Cur. *Gosset* v. *Howard*, 10 Q. B. 453.

(*i*) *Labalmondiere* v. *Frost*, 5 Jur. N. S., Q. B. 789. *Lindsay* v. *Leigh*, 11 Q. B. 465.

(*k*) *Reg.* v. *St. George, Bloomsbury*, 24 Law J., M. C. 49.

The justices cannot give themselves jurisdiction in a particular case by finding that as a fact which is not a fact (*l*), and capriciously deciding, contrary to the truth, upon the question upon which their jurisdiction depends (*m*).

Description of the offence or subject-matter of complaint.— The nature of the offence concerning which the justice is to inquire and determine must be correctly stated, in order to show that the justice has jurisdiction over it. It should be described in the words of the statute creating it (*n*). Where an act of parliament made the *wilful* misapplication of parish money by a relieving officer a penal offence, to be inquired into and adjudicated upon by justices, and the information charged merely a misapplication of the parish money, not saying that it was wilful, it was held that it did not charge any offence cognizable by the justices, and that the conviction founded upon it could not be supported (*o*). And where an act of parliament made it a penal offence, cognizable by justices, to expose to sale metal buttons marked gilt, "knowing the same not to be gilt with gold or plated with silver," and the information charged the act to have been done fraudulently and unlawfully, without saying "*knowingly*," it was held that there was no offence charged of which the justices had authority to take cognizance (*p*).

A description in the conviction of the offence, in the terms of the act creating it, where it appears from the whole tenor and scope of the act that more is necessary to be proved by the evidence in order to constitute the offence than is stated in express terms upon the face of the statute, is not a sufficient description (*q*). Where a statute enacted "that no conviction on this act shall be set aside by any court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the court," Lord Kenyon declared that he could understand the enactment so far as it regarded the proceedings before courts of quarter sessions on appeal, but not as applied to proceedings removed into the Court of King's Bench. "On an appeal," observes his lordship, "the whole case is to be gone into; evidence is to be given to support the conviction, and then it may be known whether or not the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of *that court:* but when the conviction is removed here by certiorari, I do not understand how we can inquire into those facts. The great

(*l*) *Welsh* v. *Nash*, 8 East, 404.
(*m*) *Reg.* v. *Nunneley*, 27 Law J., M. C. 261.
(*n*) *Rex* v. *Speed*, 1 Ld. Raym. 583. *Smith, ex parte*, 27 Law J., M. C. 186.
(*o*) *Carpenter* v. *Mason*, 12 Ad. & E. 630.
(*p*) *Rex* v. *Jukes*, 8 T. R. 536.
(*q*) *Fletcher* v. *Calthrop*, 6 Q. B. 880.

question here is, whether or not the material facts to constitute the offence be alleged in the conviction" (*r*).

Of singling out the offender.—Although it is sufficient, in describing an offence in a conviction, to follow out the words of the act creating the offence, yet it is always necessary to add such facts as show that the person convicted was a party to that offence so described (*s*). The conviction must single out the offender, and specify him by name, and therefore a conviction of "Harrison and Company" is a nullity, even against the party named. "We cannot tell upon the face of such a proceeding whether the delinquency of Harrison's partners who are not before the court may not have been imputed to him" (*t*). If the conviction convicts the offender of one or other of two offences in the alternative, it is bad (*u*).

Description of the locality of the offence.—It is a general rule, that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited. Justices, therefore, acting judicially, must appear to be acting *in* their jurisdiction, as well as *for* it; and those cases which seem at first sight to afford some ground for a different opinion, will be found on examination to be all cases in which the act done might be valid, though done in point of fact out of the jurisdiction (*x*). It is not sufficient to describe the justices as justices *in* the county, nor as justices *for* the county; but if they are described as doing the act as "justices in and for the county," that will suffice. "For," observes Williams, J., describes the authority, "in" the place in which the justices were when they made the order (*y*).

In convictions, the place for which the magistrates act must be shown; the offence must be set out, and either it must appear that the offence was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits (*z*). It is not sufficient to affirm that the offence was committed within a locality over which they had jurisdiction as justices, without naming it (*a*). Where justices followed a form of conviction prescribed by statute, which did not set forth the place where the offence was committed, it was nevertheless held that the conviction was bad for not showing that the offence was committed at some place within the county of which they were justices (*b*). It is not in all cases sufficient, therefore, to follow a form given by statute (*c*).

(*r*) *Rex* v. *Jukes*, 8 T. R. 540.
(*s*) *Chaney* v. *Payne*, 1 Q. B. 721.
(*t*) Per Cur. *Rex* v. *Harrison & Co.*, 8 T. R. 508.
(*u*) *Rex* v. *Morley*, 1 Y. & J. 221. *Rex* v. *North*, 6 D. & R. 146.
(*x*) *Reg.* v. *Totness*, 11 Q. B. 90. *Reg.* v. *Crowan*, 14 ib. 221.
(*y*) *Reg.* v. *Stockton*, 7 Q. B. 527.
(*z*) *Kite and Lane's* case, 1 B. & C. 104. *Rex* v. *Edwards*, 1 East, 278. *R.* v. *Chandler*, 14 ib. 274.
(*a*) *Rex* v. *Johnson*, 1 Str. 261.
(*b*) *Rex* v. *Hazell*, 13 East, 141.
(*c*) *Re Peerless*, 1 Q. B. 152.

Where a statute directs an act to be done by justices acting for the division, any justice within the county acting within the division is for this purpose a justice of the division (*d*).

Orders and adjudications by justices must show upon the face of them that the justice had jurisdiction to make the order. "However high the authority may be where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of the peace, the facts which gave the authority must be stated" (*e*). An order of justices under 11 Geo. 2, c. 19, s. 4, adjudging a party to pay double the value of goods fraudulently removed to prevent a distress, must show on the face of it that the party removing the goods was the tenant, and that the complainant was his landlord, or the bailiff, agent, or servant of such landlord, as otherwise it is not made to appear that the magistrates had any jurisdiction to make the order (*f*). There must be a distinct finding on the face of the order by the magistrates of all the facts necessary to constitute the offence, and give the justices authority to deal with it (*g*). An order of justices, therefore, was quashed because it did not appear on the face of it that they were justices of the county or for the county, but only that they were residing in the county (*h*).

The mention of the name of the county in the margin of the instrument only proves that it was made by the justices for that county, but does not show that the act to which it relates was committed in the county (*i*); nor does it show that the justices were acting within the county at the time they made the order (*k*), unless the marginal note of the county is incorporated into the body of the order by words of reference, and the whole when read together shows upon the face of it that the justices making the order were justices of or for the county, and that they made it *in* the county. Where an order of justices was headed "Westmoreland to wit," and the justices were described in the body of the order as justices of the peace "in and for the said county," it was held that this could mean no other county than the county stated in the margin; that the reference to it made it part of the order, and that it sufficiently appeared that the order was made in the county by justices for the county (*l*). But where one county was named in the margin of the order and another in the body of it, and the justices omitted to state of which county they were justices, it was held that the jurisdiction was not shown, and that the order was bad (*m*). It is not sufficient to place the name of

(*d*) *R.* v. *Price*, Cald. 305.
(*e*) Coleridge, J., *Christie* v. *Unwin*, 11 Ad. & E. 379.
(*f*) *Rex* v. *Davis*, 5 B. & Ad. 554.
(*g*) *Day* v. *King*, 5 Ad. & E. 366.
(*h*) *Rex.* v. *Dobbyn*, 2 Salk. 474.
(*i*) *Rex* v. *Austin*, 8 Mod. 310.
(*k*) *Reg.* v. *St. George, Bloomsbury*, 24 Law J., M. C. 49.
(*l*) *Reg.* v. *Casterton*, 6 Q. B. 512.
(*m*) *Rex* v. *Moor Critchell*, 2 East, 66.

a county or of a borough in the margin of the order, and state in the body of it that the order is made by justices having jurisdiction within and for the said county or borough, without stating or showing that the order itself was made by them within the county or the borough for which they were justices (*n*).

If a conviction and order, and adjudication thereupon made, are so worded as to impose a larger obligation than is imposed by the statute authorising them, the conviction and order cannot be supported. A conviction, therefore, of several defendants, making each of them liable to be imprisoned until he has paid a penalty, and the costs and expenses of conveying not only himself but the other persons convicted to gaol, will be bad unless the statute on which the conviction is founded expressly renders all the defendants liable to be imprisoned until the costs of conveying all to gaol have been paid (*o*).

Statutory forms of convictions and orders are given by 11 & 12 Vict. c. 43, s. 17. These forms begin with a marginal note of the county; and they record that on a certain day and year *within* the said county the offending party was convicted before the undersigned justices of the peace *for* the said county; they state the nature of the offence, the time and place when and where it was committed, and the adjudication and order thereupon made. In stating the offence, care must be taken to show that the offence or act is within the cognizance or jurisdiction of the justice who makes the conviction or order, and that the offence created by the statute upon which the proceedings are founded has been committed (*p*). The forms given by these statutes dispense with the necessity of setting out the information, the summoning of the defendant, the fact of his appearance or non-appearance, the evidence adduced against him, and the various details previously considered necessary to show that the magistrates proceeded *recto ordine* (*q*). "If justices substantially adopt the forms given by the statute, they do all that is required of them" (*r*).

Immateriality of mere surplusage.—If proceedings before magistrates correctly describe the offence, and show when and where it was committed, and that the magistrate had jurisdiction over it, and over the individual charged with it, and contain all that is prescribed by statute to make them valid, they are not rendered invalid because they set out the information, the summons, the defendant's appearance, the examinations of the witnesses, and a host of particulars which are not now required to be stated or set forth on the face of the proceedings. Where a particular form is required by statute, and the form actually used contains all that

(*n*) *Reg.* v. *Newton Ferrers*, 9 Q. B. 32.
(*o*) *Reg.* v. *Cridland*, 27 Law J., M. C. 28.
(*p*) *Reg.* v. *Johnson*, 8 Q. B. 106.
(*q*) *Wray* v. *Toke*, 12 Q. B. 492.
(*r*) *Allison, in re*, 10 Exch. 568.

the statute requires, and a great deal more, the unnecessary addition does not necessarily invalidate the proceedings (*s*). But it will do so if the unnecessary addition renders the order or instrument substantially different from what is required by the statute (*t*).

Effect of the conviction.— So long as the conviction remains in force, it cannot be contradicted, nor the facts recorded therein be controverted (*u*); and it is a principle of law, that where justices of the peace have an authority given them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done, unless they have acted corruptly, and have convicted and granted a warrant maliciously, and without any reasonable and probable cause (post, s. 2) (*x*). And now, although the magistrate had no jurisdiction in the matter, and had no legal authority to make the conviction or order, the conviction is nevertheless conclusive, and protects him from an action until it has been quashed.

Warrants of distress and commitment must state the cause of the committal or distress (*y*). By 11 & 12 Vict. c. 43, s. 19, it is enacted, that where a conviction adjudges a pecuniary penalty to be paid, or where an order requires the payment of money, and by the statute authorising the conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where, by the statute in that behalf, no mode of levying the penalty, compensation, &c., is provided, it shall be lawful for the justice, &c., making the conviction or order, or for any justice of the peace for the same county, riding, division, &c., to issue a distress-warrant for the levying of the same in the mode therein provided, or, in case the defendant has no sufficient goods and chattels, to issue (s. 21) a warrant of commitment. And it is enacted (s. 20), that in all cases where a justice of the peace shall issue any such warrant of distress, it shall be lawful for him to suffer the defendant to go at large, or verbally, or by a written warrant, to order the defendant to be detained in custody until return be made to such warrant of distress, unless security is given by recognizance or otherwise, to the satisfaction of such justice, for his appearance, &c. "It is to be remembered," observes Coleridge, J., "that such an imprisonment is not a part of the punishment under the conviction, but is a mere detention until the return of the warrant, in case there should be no distress. It is a power to imprison *quia timet*, extra the punishment, and such a power should be strictly pursued. Now, assuming that

(*s*) *Rex* v. *Jefferies*, 4 T. R. 769.
(*t*) *Rex* v. *Priest*, 6 T. R. 538.
(*u*) *Strickland* v. *Ward*, 7 T. R. 633, n.
(*x*) *Basten* v. *Carew*, 3 B. & C. 653.
(*y*) *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 184.

magistrates, acting in the exercise of that power, have detained a party by parol commitment for an indefinite time (the warrant of distress not being returnable on a day certain), there is an excess of jurisdiction " (*z*). In all cases of commitment of parties to prison, the exact period of imprisonment must be stated on the face of the warrant, for " if it is left indefinite, a man may be imprisoned for life " (*a*).

In all cases of convictions where the statute on which the same are founded provides no remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods can be found, the justice to whom such return is made (s. 22), or any other justice for the same county, &c., may, by his warrant, commit the defendant for any term not exceeding three calendar months, unless the sum adjudged to be paid, and all costs, &c. (the amount thereof being ascertained and stated in such commitment), shall be sooner paid. Provision is made (s. 23) for the issue of warrants of commitment for inforcing payment of penalties, and punishing (s. 24) disobedience of orders of justices.

Where an imprisonment, warrant of justices, and seizure of goods thereunder, are all defended on the ground that there was an adjudication to pay costs, and there is no such adjudication, the warrant is illegal, and the imprisonment and seizure of the goods are wrongful, and an excess of jurisdiction (*b*).

Exemption of justices from actions in respect of warrants of distress for poor-rate.—By the stat. 11 & 12 Vict. c. 44, s. 4, it is further enacted, that where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against the person named and rated therein, no action shall be brought against the justice who shall have granted such warrant by reason of any irregularity or defect in the rate, or by reason of such person not being liable to be rated therein.

Warrants of distress and commitment in case of non-payment of costs by an informer or complainant.—By 11 & 12 Vict. c. 43, s. 25, it is enacted, that where any information or complaint is dismissed with costs, the sum awarded for costs may be levied by distress on the goods of the prosecutor or complainant; and, in default of distress or payment, such prosecutor or complainant may be committed to prison for any time not exceeding one calendar month, unless such sum, and all costs and charges of the distress, and of the commitment, and conveying of such prosecutor or complainant to prison (the amount thereof being ascertained and stated in the commitment), shall be sooner paid.

Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.—It is enacted also (s. 17), that in all cases where by act of parliament authority is given to commit a person to

(*z*) *Leary* v. *Patrick*, 15 Q. B. 274.
(*a*) Ld. Denman, C. J., *Prickett* v. *Gratrex*, 8 Q. B. 1020.
(*b*) *Leary* v. *Patrick*, 15 Q. B. 274.

prison, or to levy upon his goods or chattels by distress, for not obeying any order of justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress shall issue, and such order or minute shall not form any part of such warrant of commitment or of distress. Wherever the interest of a party is to be affected by an order of magistrates, he ought to have an opportunity of contesting it (*c*).

The power of appeal to the court of quarter sessions against summary convictions of justices is not a matter of common right, but of special provision in particular statutes. It may be given either absolutely, or conditionally, and if no limits as to time be prescribed, the appeal must be brought within a reasonable time (*d*). A right of appeal cannot be implied, but must be given in express terms (*e*). Most statutes giving to justices a power of summary conviction, also give a right of appeal, and prescribe the time and mode of exercising the right; and some of them impose upon the convicting justice the duty of making known to the party convicted his right of appeal (*f*). Any person who thinks himself aggrieved by any summary conviction by borough justices, under the Municipal Corporation Act, may appeal to the court of quarter sessions in the manner therein provided (*g*).

Excess of jurisdiction may be made a ground of appeal as well as an erroneous decision. But a party having a power of appeal is not bound to appeal where a magistrate has acted without jurisdiction. He is at liberty to treat the act as void, and avail himself of all existing remedies at common law for obtaining satisfaction for the wrong done. Many recent statutes giving magistrates authority to make orders in certain cases for certain things to be done, but giving parties the power of appealing to the superior courts against the decision of such magistrates, do not in anywise abridge the controlling power of the Court of Queen's Bench, in cases where the justices have exceeded their authority, or have acted without authority. The power of appeal is given for the purpose of reviewing the decision of justices in cases where they had jurisdiction in the matter, but are supposed to have decided erroneously in point of law on the facts before them, or upon the merits. Where they had no jurisdiction to make the order, an aggrieved party is entitled to a writ of certiorari, to remove the order and quash it, just the same as if no power of appeal at all had been given (*h*).

(*c*) *Reg.* v. *Totness Un.*, 7 Q. B. 699. *Painter* v. *Liv. Gas Co.*, 3 Ad. & E. 443.

(*d*) Ld. Ellenborough, *Rex* v. *Oxfordshire Just.*, 1 M. & S. 448. *Rex* v. *Cashiobury Just.*, 3 D. & R. 35.

(*e*) *Reg.* v. *Stock*, 8 Ad. & E. 411.

(*f*) Paley on Summary Convictions, by Macnamara, pp. 295–336.

(*g*) 5 & 6 Wm. 4, c. 76, s. 131.

(*h*) *Birmingham Churchwardens, &c.* v. *Shaw*, 10 Q. B. 880; 18 Law J., M. C. 89. *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 Law J., C. P. 379. And see ante, pp. 551, 552; post, pp. 622–626.

Of the execution of convictions and orders after notice of appeal.—Some statutes giving an appeal against summary convictions expressly stay execution pending the appeal (*i*). From the 27th section of the statute 11 & 12 Vict. c. 43, it may be argued that, pending an appeal, justices are not at liberty to grant a warrant in execution, as they are expressly authorised to grant the warrant after the appeal is determined. But sect. 35 enacts that the act shall not extend to any complaints, orders, or warrants in matters of bastardy, with certain exceptions. The pendency of an appeal, therefore, against an order on a putative father, and the granting of a case for the opinion of the Court of Queen's Bench, as to whether the order ought to be enforced, does not take away the jurisdiction of justices to issue a warrant in execution of the conviction, and enforce payment of the money due under the order in the interim; for if the putative father could, as a matter of right, entirely escape all liability to contribute to the maintenance of the child pending the appeal, he might for three months allow the child to starve and oppress the mother, although he never meant *bonâ fide* to prosecute the appeal. "In a vast majority of cases, however," observes Lord Campbell, "it would be exceedingly improper in the justice to grant a warrant after notice of appeal had been given and recognizances entered into, and before the hearing of the appeal, or before the time for hearing it, has expired. And, acting from a corrupt motive, he might be liable to an action for maliciously granting it. But I do not think that in granting it he could be said to have acted without jurisdiction, and possibly he might show that he had acted laudably in granting it. It might, on the other hand, be highly improper for the justice to try to enforce the order when the justices at quarter sessions had expressed a grave doubt as to its validity, and his doing so might be evidence of malice" (*k*).

Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.—By the stat. 11 & 12 Vict. c. 44, s. 6, it is enacted, that in all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall be confirmed upon appeal, no action shall be brought against the justice who granted the warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

Statement of a case to the superior courts by way of appeal from decisions of justices.—By 20 & 21 Vict. c. 43, it is enacted, that after the hearing and determination by justices of any information or complaint which they have power to hear and determine in a summary way (*l*), either party to

(*i*) *Reg.* v. *Aston*, 1 L. M. & P. 491.
(*k*) *Kendall* v. *Wilkinson*, 4 Ell. & Bl. 690; 24 Law J., M. C. 89.
(*l*) *May, ex parte*, 2 B. & S. 428; 31 Law J., M. C. 161.

the proceeding may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days to the justices to state and sign a case, setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying. Notice of writing, with a copy of the case stated and signed, is to be given to the other party to the proceedings, and security is to be given by the appellant (s. 3) to prosecute the appeal without delay, and to pay such costs as may be awarded. If the justices refuse to state a case (s. 4), the appellant may apply (s. 5) to the Court of Queen's Bench, upon an affidavit, for a rule calling upon the justices and the respondent to show cause why the case should not be stated; and if the rule is made absolute, the case is to be stated on the appellant's entering into the required recognizances.

Power is given to the superior courts to hear and determine cases sent up to them under this statute, and reverse, affirm, or amend the decision of the justices below, or send the case back (s. 7) for amendment, and make all necessary orders in the matter. The authority and jurisdiction of the superior courts in the matter may (s. 8) be exercised by a judge at chambers, and after the decision of the superior court has been given, the order is to be enforced in the mode pointed out by the statute.

"It is a very salutary practice," observes Lord Campbell, "for the recorder or justices to find the facts, and submit them to this court for us to decide whether the case was within the jurisdiction of the justices or not. That is much better than for the court to have to gather the facts from conflicting affidavits (*m*).

Of the quashing of convictions and orders — Removal of orders and convictions by certiorari (*n*).—The proceedings of all inferior courts of record are removable by certiorari, for the purpose of being examined by the Court of Queen's Bench, except where the writ of certiorari is expressly taken away by statute (*o*); and even then the writ is not taken away, as we shall presently see, in those cases where inferior courts or magistrates have acted in a matter over which they had no jurisdiction, nor in cases where they have exceeded their jurisdiction, nor is it taken away by express prohibitory words when it is moved for on behalf of the crown. Where an order of justices confirming a conviction is void, on the ground of interest in the justices who made the order, the Court of Queen's Bench will grant a certiorari to bring up the order for the purpose of quashing it; and if the order was made by a court of quarter sessions on appeal from justices in petty sessions, the Court of Queen's Bench will grant a mandamus to compel the quarter sessions to enter continuances,

(*m*) *Reg.* v. *Dickenson*, 26 Law J., M. C. 204.

(*n*) Chitt. Arch. Pr. CERTIORARI.

(*o*) *Groenvelt* v. *Burwell*, 1 Ld. Raym. 469. *R.* v. *Moreley*, 2 Burr. 1041.

and again hear the appeal (*p*). But a party who seeks to quash a conviction on the ground that the justices were personally interested, should make the objection at the time of the hearing, or show that both he and his attorney were ignorant of the fact at that time (*q*).

Decisions which are final, and cannot be reviewed by certiorari or mandamus.— By 12 & 13 Vict. c. 45, it is enacted, that the decisions of courts of quarter sessions upon the hearing of any appeal, as to the sufficiency of the statement of any ground of appeal, and as to the amending, or refusing to amend, any order or judgment of justices appealed against, or the statement of any ground of appeal, and as to the substitution of new recognizances, shall be final, and not liable to be reviewed in any court by means of a writ of certiorari or mandamus, or otherwise.

When the writ of certiorari is not taken away by express statutory prohibition.— The writ of certiorari is not taken away by express prohibitory or restraining clauses in cases where justices of the peace have acted without jurisdiction (*r*), or where the decision has been made by a court improperly constituted, as where magistrates have acted in the execution of their office in matters and proceedings in which they were personally interested (*s*), or where it can be shown that the conviction has been obtained by fraud and collusion to defeat the law, or interfere with the pure administration of justice; for in all cases where the proceedings of courts of inferior jurisdiction are shown to have been a fraud and mockery, or the result of conspiracy and subornation of perjury, the court will exercise its jurisdiction as a court of control over inferior jurisdictions, and will interfere by certiorari and quash the proceedings, although it is expressly enacted that no certiorari shall be issued to remove them (*t*); "for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "It avoids all judicial acts, ecclesiastical or temporal," and therefore the sentence of a spiritual court may be annulled by proving the same to have been obtained by fraud or collusion (*u*).

If a local board exceed their powers in making a by-law, and a justice convicts upon the strength of it, he exceeds his authority in so doing, and the conviction may be quashed on certiorari, although the statute authorising the creation of the board and the making of the by-laws enacts that no proceeding touching the conviction of any offender shall be removable by certiorari; and the allowance of the by-law by the Secretary

(*p*) *Hopkins, ex parte*, 4 Jur. N. S., Q. B. 529.

(*q*) *Reg.* v. *Ld. Huntingtower*, 8 W. R. 562; 8 Cox Cr. C. 562. *Reg.* v. *Chelt. Com.*, 1 Q. B. 474. *Dimes* v. *Grand Junc. Can. Co.*, 3 H. L. C. 759.

(*r*) *Rex* v. *Derb. Just.*, 2 Ken. 299. *Reg.* v. *War. Just.*, 6 Ell. & Bl. 837. *Reg.* v. *Badger*, ib. 154. *Reg.* v. *St. Albans*, 22 Law J., M. C. 142.

(*s*) *Reg.* v. *Cheltenham*, 1 Q. B. 474. *Reg.* v. *Aberdare Canal Co.*, 14 ib. 854.

(*t*) *Reg.* v. *Gillyard*, 12 Q. B. 527.

(*u*) *Duchess of Kingston's* case, 2 Smith's L. C. 603.

of State makes no difference, "for no power is given to him to legislate; he can only confer an authority on a by-law made conformably to the statute authorising it to be made" (*x*).

"It is a known rule," further observes Bayley, J., "that general words in an act that no certiorari shall be allowed, or the like, will not bind the crown" (*y*), nor any private person prosecuting on behalf of the crown (*z*), for the king's prerogative cannot be taken away by act of parliament except by express words, and it is part of his prerogative to try his cause in what court he pleases (*a*). "If," observes Erle, J., "the use of the writ of certiorari were restored in all cases, for the purpose of raising questions of substance for the opinion of the court, it would be a salutary addition to the jurisprudence of this country" (*b*). The application for the writ, if made in term time, must be made to the Court of Queen's Bench. If it is made during the vacation, it must be made to a judge in chambers. Six days' notice of the application, reckoning the day of the service inclusively, and the day named for making the application exclusively, must be given to the justice or justices making the conviction or order (*c*), by the party intending to apply for the writ (*d*), signed by him, or by his attorney in his behalf. When the application is made for the removal of an order of sessions, it must be given to two justices who were present at the hearing and the making of the order (*e*). The affidavit of the service of the notice must be entitled in the Court of Queen's Bench, and must show that the notice was served six days before the day named therein for making the application, that the justices on whom the notice was served were present at the sessions when the order was made, or that they were the justices who convicted or made the order (*f*). Before the writ is issued, or before it can be treated as a valid writ, the party suing it out must enter into a recognizance, with two sureties, to prosecute, &c., and pay costs (*g*).

A certiorari will lie to remove judicial acts only. It will not be granted, therefore, to remove mere ministerial proceedings, such as a warrant to apprehend an offender, or a warrant of distress (*h*).

Proof by affidavit of the facts and circumstances calling for the interference of the superior court.—Although the proceedings before justices are all regular on the face of them, and disclose a case within the jurisdiction

(*x*) *Reg.* v. *Wood*, 5 Ell. & Bl. 55. *Brown* v. *Local Board, Holyhead*, 32 Law J., Exch. 25.

(*y*) *Rex* v. *Allen*, 15 East, 342. *Rex* v. *Davies*, 5 T. R. 626.

(*z*) *Reg.* v. *Spencer*, 9 Ad. & E. 485.

(*a*) *Rex* v. *Berkley*, 1 Ken. 100.

(*b*) *Reg.* v. *Dickenson*, 26 Law J., M. C. 206.

(*c*) *Rex* v. *Goodenough*, 2 Ad. & E. 463.

(*d*) *Rex* v. *Lancashire Justices*, 4 B. & Ald. 289.

(*e*) *Rex* v. *Rattislaw*, 5 Dowl. P. C. 539.

(*f*) *Reg* v. *How*, 11 Ad. & E. 159.

(*g*) Corner's Crown Pr. Chitt. Arch. Pr. CERTIORARI.

(*h*) *Rex* v. *King*, 2 T. R. 235. *Rex* v. *Atkins*, 4 ib. 12.

of the magistrates, yet the parties on either side may bring before the superior court affidavits disclosing on the part of the magistrates the evidence on which they acted, and on the part of the defendant the evidence on which he relied before them, as well as other evidence affecting the merits not adduced before them, for the purpose of showing that the case was not within the jurisdiction of the magistrates. The superior court has no power to review the decision on the merits, and to reverse it on the ground that it was unwise or unjust. All that it can do is to see that the case was within the jurisdiction of the magistrates who adjudicated upon it, and that their proceedings are on the face of them regular, and according to law (*i*).

"Magistrates," observes the court, "cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it (*k*). But it is obvious that this may have two senses: in the one it is true; in the other, on sound principle and on the best-considered authority, it will be found untrue. Where the charge laid before the magistrate does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty, by his conviction in the very terms of the statute, would not avail to give him jurisdiction. If the charge being really insufficient, the magistrate has misstated it in drawing up the proceedings, so that they appear to be regular, it would be clearly competent to the defendant to show by affidavits what the real charge was, and that appearing to be insufficient, we should quash the conviction. Wherever a charge has been presented to the magistrate over which he had no jurisdiction, he had no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for and against the charge, the proper, or the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon

(*i*) *Terry* v. *Huntingdon*, Hardr. 480. (*k*) *Welsh* v. *Nash*, 8 East, 404.

principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the fact disclosed in the progress of the inquiry" (*l*).

Affidavits may be used to show that there was no evidence before the justice of the facts necessary to give him jurisdiction in the matter, but if there were facts in evidence before the justice, from which it was reasonable to infer that he had jurisdiction, it cannot be shown that there was other evidence, from which the justice might reasonably have inferred the contrary; for that would only go to show that the finding of the justice on a matter within his jurisdiction was wrong. Thus, although an information under 4 Geo. 4, c. 34, for punishing certain classes of servants who have contracted to serve, and have refused to enter upon the service, or have absented themselves therefrom without leave, or have misconducted themselves in such service, is good on its face, as showing that there was the requisite contract to serve, yet it is competent to an accused party to show that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was any contract of service at all, and that there was nothing from which he could legally or reasonably infer that he had any jurisdiction in the matter (*m*).

If justices have proceeded to remove a pauper without any complaint by parish officers of the chargeability of such pauper, the fact may be shown by affidavit; for if there is no complaint, the magistrates have nothing before them in respect of which they can make an order, or exercise their magisterial functions (*n*).

Amendment of orders or judgments of justices on return to a certiorari.—By 12 & 13 Vict. c. 45, s. 7, it is enacted, that if upon the return to any writ of certiorari any objection shall be made, on account of any omission or mistake in the drawing up of an order or judgment of justices, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order, or giving such judgment, to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed; but no such objection is to be allowed unless the omission or

(*l*) *Reg.* v. *Bolton*, 1 Q. B. 72. *Thompson* v. *Ingham*, 14 Q. B. 718. *Thompson, in re*, 30 Law J., M. C. 23. *Penny, in re*, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225.

(*m*) *Bailey's* case, 3 Ell. & Bl. 618. *Reg.* v. *Dickenson*, 26 Law J., M. C. 204. *Pedgrift* v. *Chevallier*, 8 C. B., N. S. 240, 246. *Ellis* v. *Kelly*, 6 H. & N. 222.

(*n*) *Reg.* v. *Justices of Bucks*, 3 Q. B. 807.

mistake has been specified in the rule for issuing such certiorari (*o*). If, therefore, on the face of an order, the justices making it are not described as justices "in and for" the borough in which the order is made, or there is any other defect in point of form, the court will amend the defect without payment of costs on either side (*p*).

Of testing the legality of a commitment by writ of habeas corpus.—The legality of an imprisonment under a warrant of commitment may be brought under the consideration of the superior courts, or a judge in chambers, by writ of *habeas corpus*, which may be sued out either in term or vacation. It is directed to the gaoler in whose custody the prisoner is detained, directing him to bring up the body of such prisoner before the court or judge, together with the cause of his being taken and detained (*q*). Where a prisoner has been lodged in gaol under a bad warrant of commitment in execution of a conviction, a good warrant of commitment subsequently made out and delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to that rule (*r*).

The validity of the commitment may be tried on moving for a rule to show cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged, without the writ actually issuing, or the prisoner being personally brought before the court (*s*). On moving for a writ of *habeas corpus*, the conviction may be brought before the court, verified by affidavit, for the purpose of defeating the magistrate's commitment; but in such case the commissioner, before whom the affidavit is sworn, ought to certify on the exhibit annexed that it is the document referred to in the affidavit (*t*). Although a return to a writ of *habeas corpus* may be good on the face of it, it may be shown that the conviction and commitment, under which the prisoner is detained, were substantially a civil proceeding, and that the arrest took place on a Sunday (*u*).

Upon a return to a *habeas corpus* affidavits are not admissible to show that the offence was not committed within the jurisdiction of the committing justice (*x*).

When a prisoner is entitled to his discharge from custody as a matter of right, the court has no power to impose any terms upon him as the condition of his release, and will not make his discharge from custody dependent upon his undertaking to bring no action against those who have unlawfully caused him to be imprisoned (*y*).

(*o*) *Reg.* v. *Higham*, 26 Law J., M. C. 116.

(*p*) *Reg.* v. *Hellingley*, Ell. & Ell. 749; 28 Law J., M. C. 167; 7 W.R., Q. B. 413.

(*q*) 2 Chitt. Arch. Pr. 1240. Fry's HABEAS CORPUS (*Canadian Prisoner's* case).

(*r*) *Cross, ex parte*, 26 Law J., M. C. 201. *Reg.* v. *Richards*, 5 Q. B. 932. *Smith, ex parte*, 27 Law J., M. C. 186.

(*s*) *Eggington's* case, 2 Ell. & Bl. 731.

(*t*) *Allison, in re*, 10 Exch. 561.

(*u*) *Eggington's* case, 2 Ell. & Bl. 717. *Swan* v. *Dakins*, 16 C. B. 93.

(*x*) *Smith, ex parte*, 27 Law J., M. C. 186.

(*y*) *Downey's* case, 7 Q. B. 281.

Proceedings against justices to compel them to act in particular cases.— By the stat. 11 & 12 Vict. c. 44, s. 2, reciting that it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised, by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought against him, it is enacted, that in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice (*z*), it shall be lawful for the party requiring such act to be done to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of, costs, as to them shall seem meet; and the justice, upon being served with such rule absolute, is to obey the same and do the act required; and no action or proceeding whatsoever is to be commenced or prosecuted against such justice for having obeyed the rule and done the act thereby required (*a*).

Before the court will make an order under this section of the statute it must be satisfied that the act sought to be enforced would be a lawful act. Where a rule was obtained calling upon justices to show cause why they should not issue a distress-warrant to enforce an order made by them, and it appeared that the order was invalid, and that the issuing and execution of a distress-warrant upon it would be an act of trespass, the court discharged the rule (*b*). But the court cannot inquire into the merits, and if the justices have jurisdiction, and the order is good upon the face of it, they will be compelled to enforce it (*c*).

The court will not try a doubtful question of title on application for an order under this section. "It would be very awkward," observes Patteson, J., "if the new statute had the effect of bringing all questions of title before us upon affidavit (*d*).

Right of county justices to order the expense of county litigation to be defrayed out of the county funds.—Wherever a duty is imposed on a county, and costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence of the county purse have a right to defray such expenses out of

(*z*) As to what is a refusal, see *R.* v. *Paynter*, 26 Law J., M. C. 102.

(*a*) *Reg.* v. *Mainwaring*, 1 Ell. Bl. & Ell. 474.

(*b*) *Reg.* v. *Collins*, 21 Law J., M. C. 73.

(*c*) *Hartley, in re*, 31 Law J., M. C. 232.

(*d*) *Reg.* v. *Browne*, 13 Q. B. 654.

the county stock. Expenses of this sort have always been borne by the county, and uniform and unbroken usage *facit jus* (*e*).

SECTION II.

EXEMPTION OF CONSTABLES AND THEIR ASSISTANTS FROM LIABILITY WHEN ACTING IN THE EXECUTION OF WARRANTS AND ORDERS OF MAGISTRATES.

Of the breaking and entering a dwelling-house in execution of a warrant.— In every case where the outer door of a dwelling may be lawfully broken open in order to make an arrest or to execute civil process, the officer must, as we have seen, first give due notice of his business, and must have demanded and have been refused admission. "Where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may, in any of these cases, be forced; the notification, demand, and refusal before mentioned having been previously made. In these cases, the principles of political justice conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demand of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion" (*f*).

Illegal arrest by constables.— We have already seen that where police-constables make an arrest in furtherance of a civil proceeding, or for disobeying an order of justices for the payment of money, they are bound to have the warrant for the arrest with them at the time of the arrest, ready to be produced if demanded, and if they have it not the arrest will be illegal, although the party arrested has not asked to see the warrant (*g*).

Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to a warrant of justices.— By 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand and seal of any justice, until demand has been made or left at his usual place of abode by

(*e*) *Rex* v. *Essex*, 4 T. R. 591.
(*f*) Sir Michael Foster's *Discourse of Homicide*, p. 319.
(*g*) *Galliard* v. *Laxton*, 31 Law J., M. C. 123.

the party intending to bring the action, or his attorney or agent, in writing, signed by the party demanding the same (*h*), of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after demand. And in case after demand and compliance therewith any action shall be brought against such constable, officer, or person acting in his aid, without making the justice a defendant, the jury shall, on production and proof of the warrant at the trial, give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice. And if the action is brought jointly against the justice and constable, or officer, &c., then, on proof of the warrant, the jury shall find for such constables, officer, &c., notwithstanding such defect of jurisdiction.

Every person to whom a statute requires a warrant to be directed, and who is required to execute the same, may be considered an officer of the law, coming within the principle of the protection afforded by this statute (*i*), and has the period of six days after the demand of his authority for the production of it; within which time, if he comply with the demand, he secures his indemnity. But if he delay after that time, he subjects himself to be sued as any other person. If, however, after the six days have expired, but before the issue of a writ, he complies with the demand, he is still entitled to the protection of the statute (*k*). This statute is confined to actions of tort (*l*), and the officer, in order to be entitled to the protection, must show that in doing what he did he acted in obedience to the warrant; for if he exceeds his authority, or acts without a warrant, or arrests a party not named in the warrant, he is not entitled to the benefit of the statute (*m*).

If the warrant is directed to be executed within the limits of a particular county, and the officer by mistake executes it beyond the prescribed limits, he has not acted in obedience to the warrant, and is not entitled to the statutory protection (*n*). Neither can he claim the benefit of this 6th section of the statute in cases where, when acting under a search-warrant, he has seized and carried away articles not mentioned in the warrant, and not in anywise connected therewith (*o*); nor when, under a warrant to apprehend A, or to seize the goods of A, he apprehends B, or takes the goods of B (*p*); nor if he exceeds the authority given him by the warrant and commits any excess, such as remaining longer in a dwelling-house than he was legally authorised to remain, or breaking open

(*h*) *Clark* v. *Woods*, 2 Exch. 405.
(*i*) *Pedley* v. *Davis*, 30 Law J., C. P. 374.
(*k*) *Jones* v. *Vaughan*, 5 East, 447.
(*l*) *Irving* v. *Wilson*, 4 T. R. 485.
(*m*) *Bell* v. *Oakley*, 2 M. & S. 259. *Postlethwaite* v. *Gibson*, 3 Esp. 226. *Galliard* v. *Laxton*, ante, p. 629.
(*n*) *Milton* v. *Green*, 5 East, 238.
(*o*) *Crozier* v. *Cundey*, 6 B. & C. 232.
(*p*) *Money* v. *Leach*, 3 Burr. 1768. *Kay* v. *Grover*, 7 Bing. 312; 5 M. & P. 145. *Hoye* v. *Bush*, 1 M. & Gr. 775; 2 Sc. N. R. 92.

doors and windows which he was not authorised to break open (*q*). But wherever the officer has acted in obedience to the warrant, he secures his indemnity by complying with the requirements of the statute, although the warrant may be illegal or improper, or may have been granted by a magistrate who had no jurisdiction or power to grant it (*r*). If the officer loses the protection of the statute, he must justify under the justice's warrant (*s*).

By the stat. 11 & 12 Vict. c. 43, s. 19, constables are authorised to execute warrants out of their districts, provided they are executed within the jurisdiction of the justice granting or backing the same. But the constable is not bound to execute a warrant out of his district (*t*). A warrant of distress for rates directed to two persons for execution, may be executed by one of them alone (*u*).

Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.—If a constable abuses the legal authority conferred upon him by detaining a prisoner an unreasonable time without taking him before a magistrate, or by unnecessarily handcuffing him, he becomes a trespasser *ab initio*, and cannot protect himself under the warrant. A constable or peace-officer has no right to handcuff an unconvicted prisoner unless he has attempted to escape, or except it be necessary in order to prevent his escaping. "Such a degree of violence and restraint," observes Bayley, J., "upon the person cannot be justified, even by a constable, unless he makes it appear that there are good special reasons for his resorting to it" (*x*).

Abuse of a search-warrant.—If a constable armed with a search-warrant searches the wrong house, or stays an unreasonable and unnecessary time in a house he is authorised to search, or uses any unnecessary violence in the execution of the warrant, or seizes things not specified in the warrant, and which are not likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, or to support a charge of felony, he becomes a trespasser, and is liable to an action for damages (*y*).

Arrest by private individuals acting in aid of a constable.—All persons called by a police-constable to his assistance may, as we have seen, whilst acting in aid of the constable, arrest and detain all such offenders as the constable himself is authorised to arrest and detain (ante, p. 502).

(*q*) *Peppercorn* v. *Hofman*, 9 M. & W. 628. *Bell* v. *Oakley*, 2 M. & S. 259.

(*r*) *Atkins* v. *Kilby*, 11 Ad. & E. 784. *Price* v. *Messenger*, 2 B. & P. 158. *Reg.* v. *Davis*, 30 Law J., M. C. 159.

(*s*) *Read* v. *Coker*, 13 C. B. 859.

(*t*) *Gimbert* v. *Coyney*, 1 M'Clel. & Y. 409.

(*u*) *Lee* v. *Vessey*, 25 Law J., Exch. 271.

(*x*) *Wright* v. *Court*, 6 D. & R. 625; 4 B. & C. 596. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 Law J., Exch. 134.

(*y*) *Crozier* v. *Cundey*, 6 B. & C. 232; 9 D. & R. 224. Burns' Justice, SEARCH-WARRANT.

SECTION III.

REMEDIES FOR WRONGS DONE UNDER COLOUR OF CONVICTIONS AND WARRANTS OF JUSTICES.

Replevin of chattels distrained under warrant of justices.—"Though in ordinary practice," observes Parke, B., "the remedy by replevin is applied only to a distress for rent, yet it is at common law applicable in all cases where goods are improperly taken (*z*); and I find no satisfactory authority to show that it will not lie where goods are improperly taken under a warrant of a justice of the peace. In some cases, no doubt, the court will interfere to prevent a replevin, to save its process from being defeated. The rule is correctly stated in Chief Baron Gilbert's treatise on Replevin, p. 138, where it is said, 'If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution, and if any person shall pretend to take out a replevin and execute it, the court would commit them for contempt for attempting to defeat the execution, and would punish the sheriff by attachment.' But Chief Baron Gilbert also says, 'that in cases in which the court has no jurisdiction, the goods may be replevied.' If, therefore, goods have been seized under a justice's warrant, and the justice had no jurisdiction to make the warrant, the goods so seized may be replevied" (*a*). "It is true," further observes Alderson, B., "that replevin will not lie for goods seized under the judgment of a superior court; for if you replevied on the first judgment, you could do so on the judgment upon that also, and so there would be replevin on replevin *ad infinitum*. It is different in the case of an inferior jurisdiction, which is to be set right by the superior" (*b*).

Of actions against justices.—By the stat. 11 & 12 Vict. c. 44, s. 1, it is enacted, that every action thereafter against a justice of the peace, for any act done by him in the execution of his duty with respect to any matter within his jurisdiction, shall be an action on the case as for a tort, and in the declaration of the cause of action it shall be expressly alleged and proved at the trial that the act was done maliciously, and without reasonable and probable cause.

Also (s. 2), that for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, or order made, or warrant issued, by such justice in

(*z*) *Mellor* v. *Leather*, 1 Ell. & Bl. 619.

(*a*) *Gay* v. *Mathews*, 32 Law J., M. C. 58. *Pease* v. *Chaytor*, ib. 121. *George* v. *Chambers*, 11 M. & W. 159. *Morrell* v. *Martin*, 3 M. & Gr. 590. Parke, B., *Jones* v. *Johnson*, 5 Exch. 875.

(*b*) Ib. 161. As to proceedings in Replevin, see ante, pp. 464–467.

any such matter, may maintain an action against such justice as before the passing of the act, without proving that the act was done maliciously, and without reasonable and probable cause: but no such action shall be brought for anything done under such conviction or order, until after the conviction shall have been quashed, either upon appeal or upon application to the Court of Queen's Bench: nor shall any such action be brought for anything done under any warrant which shall have been issued by such justice to procure the appearance of a party before him, and which shall have been followed by a conviction or order in the same matter, until after the conviction or order shall have been quashed; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence; nevertheless, if a summons was issued previously to such warrant, and served upon the party, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons (*c*), in such case no action shall be maintained against such justice for anything done under such warrant.

When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction, therefore, as where a warrant is made or an order granted, which the justice had no authority to make or to grant, and the warrant or order has been enforced, and any person has been imprisoned or his goods have been seized under it, an action for a trespass is maintainable against the justice (*d*). But before such action is commenced notice of action must be given (post, p. 636), and the conviction or order must be quashed.

When the action is brought for a malicious conviction, commitment, or distress, or a malicious abuse by a magistrate of the functions of his office, it is not necessary to get the conviction quashed before bringing the action, but notice of action must be given, and the action must be brought, within the time limited by the statute, and proof must be given that the magistrate acted corruptly or maliciously, and had no reasonable or probable cause for convicting or making the order (*e*).

Where an information was laid before a justice, upon which he convicted and awarded a penalty and costs, and ordered them to be levied by distress, and so far pursued his jurisdiction, but he then exceeded it, by adding an alternative that the plaintiff should be put in the stocks in case the penalty and costs were not paid or raised by distress, and the plaintiff's goods were seized under a distress, but the plaintiff was not put in the

(*c*) An appearance by counsel or attorney is a sufficient appearance. *Bessell* v. *Wilson*, 1 Ell. & Bl. 496.

(*d*) *Leary* v. *Patrick*, 15 Q. B. 272. *Lawrenson* v. *Hill*, ante, p. 618.

(*e*) *Kirby* v. *Simpson*, 10 Exch. 367; 23 Law J., M. C. 165; post, p. 642.

stocks, and the conviction was afterwards quashed, and an action was brought against the justice for the distress, it was held that the justice was entitled to the protection afforded by the first section of the statute, and could not be treated as a trespasser. "It cannot be doubted," it was observed, "that the justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. The construction of sect. 2 of the statute must be so controlled by sect. 1 as to be consistent with it; and that is done by so construing sect. 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case, if the plaintiff had been put in the stocks, and had brought his action for that" (*f*).

Where justices proceed to adjudicate upon the liability of a party to pay a church-rate after notice that the validity of the rate, or the liability to pay it is disputed (ante, p. 609); and it manifestly appears that the rate is disputed *bonâ fide*, and the magistrates nevertheless make an order and issue their warrant, and goods are seized under the warrant, they act, as we have seen, wholly without jurisdiction, and are liable in trespass after the order has been quashed (*g*). But if there is reasonable ground before them for coming to the conclusion that neither the rate nor the liability to pay is *bonâ fide* disputed, and that the objection is merely brought forward for delay, then, although they come to an erroneous conclusion in the matter, they are not liable to an action; for it has been held that it is not sufficient for a jury in an action against them to find that the plaintiff did *bonâ fide* dispute the validity of the rate and give notice of that fact to the defendants, but that it ought also to be found that the justices in proceeding, notwithstanding the notice, acted maliciously, and without reasonable and probable cause; for, as they had to form a judgment upon facts from which different conclusions might reasonably be drawn, they could not be made responsible for an erroneous judgment formed *bonâ fide* upon those facts (*h*).

We have already seen that s. 4 of the statute 11 & 12 Vict. c. 44, protecting justices from actions by reason of the manner in which they have exercised a discretionary power, applies only to cases where the magistrate had authority to do the act respecting which he exercises his discretion, and that he must be acting judicially, and not ministerially, in the exercise of his discretion in order to avail himself of the statutory protection. If, in the exercise of a mere ministerial function, he issues a

(*f*) Per Coleridge & Erle, Js. *Barton* v. *Bricknell*, 13 Q. B. 393; 20 Law J., M. C. 1. *Lawrenson* v. *Hill*, ante, p. 601.

(*g*) *Pease* v. *Chaytor*, 1 B. & S. 658; 31 Law J., M. C. 1; ante, p. 610.

(*h*) *Pease* v. *Chaytor*, 32 Law J., M. C. 121; 9 Jur. N. S. 664. Mellor, J., dissentiente; ante, p. 610.

warrant which he has no authority to issue, he may at once render himself liable to an action of trespass (ante, p. 611).

Effect of the existence of a power of appeal on the right to bring an action. — It does not follow that because a plaintiff had a power of appeal and failed to exercise it, that he is thereby precluded from having recourse to the ordinary remedy by action to try the right. There is a great distinction in this respect between cases where there was jurisdiction to convict or to make an order and issue a warrant, and the aggrieved party had a ground of appeal against the conviction or order made with jurisdiction, and the case where there was no jurisdiction to convict or to make the order, and so no jurisdiction to issue the warrant. "If, in the first instance, the court has gone beyond its jurisdiction, the act is void. The party grieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and if the court of appeal erroneously confirms the act of the court below, it may be that the party appealing cannot object to the want of jurisdiction in any collateral proceeding. His own act may estop him personally, but he is not bound to appeal, because he is at liberty to treat the act as void (*i*).

Objections by justices to actions in the county court. — In all actions against justices of the peace in the county court, the action must be brought in the court within the district in which the act complained of was committed; but no action can be brought in any county court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto (*k*). Where a justice of the peace, who had been sued in the county court for an act done by him in the execution of his office, gave notice that he objected to being sued in the county court, and afterwards applied for and obtained a writ of certiorari to remove the cause from the county court into the Court of Exchequer, it was held that his notice terminated the proceedings in the county court altogether, and that the suit could not be revived in the superior court (*l*).

Of setting aside certain actions brought against justices of the peace. — Provision is made by the stat. 11 & 12 Vict. c. 44, s. 7, for setting aside proceedings in certain actions against justices of the peace, brought in defiance of the provisions (ante, pp. 632, 633) of that statute.

Limitation of actions against justices of the peace. — By s. 8 it is enacted, that no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months after the act complained of has

(*i*) *Birmingham Churchwardens* v. *Shaw*, 10 Q. B. 880; 18 Law J., M. C. 89. *Pedley* v. *Davis*, 10 C. B. N. S. 492; 30 Law J., C. P. 379.

(*k*) 11 & 12 Vict. c. 44, s. 11.

(*l*) *Weston* v. *Sneyd*, 1 Hurl. & Norm. 703; 26 Law J., Exch. 161.

been committed. The period of limitation runs from the termination, not from the commencement, of the wrongful act (*m*). Therefore, when a party has been wrongfully imprisoned under an illegal commitment, the time of limitation will run from the period of the termination of the imprisonment, and not from the time of the making out of the warrant of commitment (*n*). And where goods have been sold under an illegal warrant of distress, the time of limitation will run from the period of the sale of the goods, and not from the time of the original seizure. The seizure is not made absolutely in the first instance, but with a view only to the detention of the goods until the amount ordered to be levied should be paid, and their subsequent sale if it should not be paid, so that the seizure and sale form part of one continued grievance, which distinguishes it from cases where the seizure was for a forfeiture (*o*).

Where an action is intended to be brought against a justice of the peace for a wrongful imprisonment, under a conviction or order of commitment which the justice had no jurisdiction to make, the time of limitation will run from the time of the making of the conviction or order, and not from the time of the quashing thereof. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action (*p*).

Of notice of action against justices.—By s. 9 it is enacted, that no action shall be commenced against any justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney or agent; in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party intending to sue, and also of the attorney or agent, when the notice is served by an attorney or agent (*q*).

Statutory clauses for the protection of magistrates in the execution of the duties of their office, appear always to have been construed on the principle that where the magistrate, with some colour of reason and *bonâ fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally or exceed his jurisdiction (*r*). And where he acts in his magisterial capacity mali-

(*m*) *Jacomb* v. *Dodgson*, 32 Law J., M. C. 113.

(*n*) *Massey* v. *Johnson*, 12 East, 67. *Hardy* v. *Ryle*, 9 B. & C. 607. *Violett* v. *Sympson*, 8 Ell. & Bl. 346.

(*o*) *Collins* v. *Ross*, 5 M. & W. 202.

(*p*) *Haylock* v. *Sparke*, 1 Ell. & Bl. 471; 22 Law J., M. C. 67, 71.

(*q*) As to notice of action, see ante, pp. 501–503, 572, 577.

(*r*) *Hazeldine* v. *Grove*, 3 Q. B. 1006. *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 504; ante, pp. 499–501.

ciously, and without *bona fides*, he is also entitled to the statutory protective preliminaries to an action, and to an opportunity of tendering amends. A magistrate may act maliciously (post, s. 2), and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty although he may act maliciously; and in all cases where the substance of the complaint is that he has abused his power as a magistrate, he is entitled to notice of action (*s*). The question as to whether the magistrate was acting in the execution of his office, is a question at the trial for the judge, and not for determination by a jury (*s*).

Wherever the magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, although the place where the offence was committed was not within his jurisdiction (*t*). In a case where one magistrate acted alone in a matter which required the concurrence of two, it was held that he was acting in execution of his office, and was entitled to notice of action (*u*).

Wherever, also, the magistrate, in what he did, intended to act in the execution of some special power or authority conferred by a statute requiring notice of action to be given, notice of action must be given to the magistrate, although, in point of fact, he was not acting under the statute, and had no power to do what he has done (ante, pp. 499–501). But to be entitled to the protection, the party claiming it must be actually a justice, accidentally committing an error, and not doing a wrongful act for his own benefit (*x*).

A person who intends to sue a justice of the peace for an act done by him in a matter respecting which he had no jurisdiction, must not wait for the quashing of the conviction or order of commitment before giving the notice of action. The notice of action may be given as soon as the wrongful act has been committed, though the action itself cannot be commenced until after the conviction or commitment has been quashed (*y*). If in the case of a conviction the magistrate receives notice of action before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends; but if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after service of the notice (*z*).

Statement of the cause of action on the face of the notice.— The nature of the cause of action, or of the complaint or grievance, should be explicitly stated on the face of the notice, so as to show whether the plaintiff pro-

(*s*) *Kirby* v. *Simpson*, 10 Exch. 358; 23 Law J., M. C. 165.

(*t*) *Prestidge* v. *Woodman*, 1 B. & C. 12; 2 D. & R. 45.

(*u*) *Weller* v. *Toke*, 9 East, 363.

(*x*) *Morgan* v. *Palmer*, 2 B. & C. 729; 4 D. & R. 433. *Briggs* v. *Evelyn*, 2 H. Bl. 114.

(*y*) *Haylock* v. *Sparke*, 22 Law J., M. C. 67; ib. Q. B. 155.

(*z*) Ib. 67.

ceeds against the magistrate for an act done by him maliciously, and without reasonable and probable cause, in the execution of his duty as a justice, with respect to some matter within his jurisdiction, within the first section of 11 & 12 Vict. c. 44, or for an act done by him in a matter over which he had no jurisdiction, or respecting which he had exceeded his jurisdiction within the second section of that statute. If the notice fails clearly and explicitly to point out the nature of the cause of action, so as to show whether it is governed by the first or the second section of the statute, it will be a bad notice (*a*). "But the notice," justly observes Abbott, C. J., "ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained" (*b*). The time and place of the doing the act complained of ought also to be stated in the notice. "I do not go so far," observes Lord Denman, "as to say that a party will always be strictly bound to prove the time and place which he names in his notice, but I think the words of the statute require that a time and place for the occurrence be named (*c*).

Tender of amends before action.—By 11 & 12 Vict. c. 44, s. 11, it is further enacted, that after notice of action has been given to a justice, and before the action shall be commenced, the justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuited. Whether the preliminary matters required by statute for the protection of magistrates have been duly complied with appears to be a question for the decision of the judge at the trial, and not for determination by a jury (*d*).

Of the computation of the month's notice, and of the time for tendering amends.—The general rule is, that when time for a particular period is allowed to a party to do any act, the day from which the computation is to be made is to be reckoned exclusively. And whenever a certain space of time is given to a party to do some act, which space of time is included between two other acts to be done by another person, "both the days of doing those acts ought," observes Alderson, B., "to be excluded, in order to insure to him the whole of that space of time." Thus, where a month's notice of action is required to be given to a justice of the peace before an

(*a*) *Taylor* v. *Nesfield*, 3 Ell. & Bl. 724; 23 Law J., M. C. 169.

(*b*) *Prickett* v. *Gratrex*, 8 Q. B. 1020. *Jones* v. *Bird*, 5 B. & Ald. 844. *Jacklin* v. *Fytche*, 14 M. & W. 387.

(*c*) *Martins* v. *Upcher*, 3 Q. B. 668.

(*d*) Parke, B., *Kirby* v. *Simpson*, 10 Exch. 366. *Arnold* v. *Hamel*, ib. 366.

action can be commenced against him, and the justice is to have the whole of that month for tendering amends, both the day of the giving of the notice and the day of the tendering amends are to be excluded from the computation of the time ; for, wherever the act of parliament allows a party an intervening period of a month, within which to deliberate whether he will tender amends or not, unless you exclude both the first and the last day, you do not give him a whole month for that purpose (*e*).

Of the statutory protection to constables, officers, and their assistants from vexatious actions.—We have already seen that actions against constables, their deputies and assistants, for anything done by them by virtue of their offices, or in the execution of an act of parliament, must be brought and tried within a certain limited period in the county where the cause of action arose ; that notice of action must be given ; that tender of amends may be made before action ; that the general issue may be pleaded, and the act of parliament under which the constable intended to act, and the special matter, may be given in evidence under that plea (ante, pp. 497–503). Where, therefore, a constable is acting *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the time in obedience to the warrant of a magistrate, he is entitled to the statutory protection, although he is altogether mistaken in the proceeding he has adopted, and had in truth no warrant or authority for what he has done. If, for example, an officer meaning *bonâ fide* to act under a warrant, by mistake arrests the wrong person, or seizes the goods of the wrong party, and so does an act which the warrant did not order him to do, and for which he had consequently no authority, he is, nevertheless, if he acted *bonâ fide*, entitled to the benefit of the protecting clause, limiting the time for the bringing of an action against him for the trespass (*f*).

Various acts of parliament clothing justices of the peace, constables, and officers with special powers and authorities in particular cases, limit the time for bringing actions against them for anything done in pursuance of such statutes to three, or six, or twelve months, and the object of these statutes clearly is, as we have already seen, to protect persons acting illegally, but in supposed pursuance, and with a *bonâ-fide* intention of discharging their duty, under the act of parliament (*g*).

Parties to be made defendants — Wrongful convictions and orders by one justice acted upon by another justice.—By 11 & 12 Vict. c. 44, s. 3, it is enacted, that where a conviction or order shall be made by one justice, and a warrant of distress or of commitment shall be granted thereon by

(*e*) Alderson, B., *Young* v. *Higgon*, 6 M. & W. 54; ante, p. 457.

(*f*) *Parton* v. *Williams*, 3 B. & Ald. 335. *Smith* v. *Wiltshire*, 5 Moore, 322; ante, pp. 499–501.

(*g*) *Theobald* v. *Crichmore*, 1 B. & Ald. 229; ante, pp. 499–502.

some other justice of the peace, *bonâ fide* and without collusion, no action shall be brought against the latter by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice who made the same; but the action, if maintainable, is to be brought against the justice or justices who made the conviction or order.

Liability of parties who set justices and constables in motion.—A person who merely lays a cause of complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not responsible for an assault and false imprisonment, although the particular case be one in which the magistrate had no authority to act (*h*). But if the proceeding is founded in malice, or if the complainant accompanies the constable charged with the execution of the warrant, and points out the party to be arrested under it, he may render himself liable either to an action for a malicious prosecution, or to an action for false imprisonment (*i*). If a private party intervenes between the magistrate and the constable, and busies himself in executing the justice's warrant, and the proceedings should be set aside, he may render himself responsible in damages for the consequences of his interference (*k*). Where the defendant having accused the plaintiff of embezzlement, both parties agreed to go before a magistrate to settle the matter, and the defendant, addressing the magistrate, said he came to prefer a charge of embezzlement against the plaintiff, whereupon the plaintiff was ordered to go into the dock, and was detained in custody until the charge had been heard and dismissed, it was held that the defendant was not responsible for the imprisonment, which was an act done by the magistrate in the exercise of his authority (*l*).

All persons called by a police-constable to his assistance may, as we have seen, whilst acting in aid of the constable, arrest and detain all such offenders as the constable himself is authorised to arrest and detain; but if a private individual, not being called upon by a constable to aid and assist him in the execution of his duty, and not acting under the command and authority of the constable, officiously interferes and gives false information to the constable and wrong directions, and thereby causes a wrongful arrest, he is, as we have seen (ante, pp. 504–507), responsible for the wrongful imprisonment brought about by his instrumentality. The same consequences follow if, by his officious intermeddling, he causes the goods of the wrong person to be seized under a distress-warrant (ante, pp. 579, 580).

(*h*) *Carratt* v. *Morley*, 1 Q. B. 28.
(*i*) *Cohen* v. *Morgan*, 6 D. & R. 8. *Barber* v. *Rollinson*, 1 Cr. & M. 330. *West* v. *Smallwood*, 3 M. & W. 418; ante, chs. 12, 13.
(*k*) *Painter* v. *Liv. Gas Co.*, 3 Ad. & E. 444.
(*l*) *Brown* v. *Chapman*, 6 C. B. 370. *Barber* v. *Rollinson*, 1 Cr. & M. 330.

Declaration of the cause of action—Venue.—We have already seen that in every action against a justice of the peace the venue must be laid in the county where the act complained of was committed, and that the same rule applies in the case of actions against constables and officers in respect of things done by them by virtue of their offices (*m*), or in execution of particular acts of parliament; also, that where an action is brought against a justice of the peace for any act done by him in the execution of his duty as a justice, with respect to any matter within his jurisdiction as such justice, the declaration must expressly allege that the act was done maliciously, and without reasonable and probable cause (*n*). But any person injured by any act done by a justice of the peace, in a matter of which, by law, he has not jurisdiction, or in which he shall have exceeded his jurisdiction, or by any act done under any conviction, or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice, in the same form as he might have done before the passing of that statute, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause (*o*).

Evidence under pleas of Not guilty—Not guilty by statute.—In all actions against justices of the peace for any act done by them in the execution of their duty as justices, with respect to any matter within their jurisdiction, the plaintiff must prove at the trial that the act was done maliciously, and without reasonable and probable cause (ante, pp. 632–634). In all actions, moreover, against justices of the peace for any matter done by them in the execution of their office, they may plead the general issue—Not guilty by statute, and give the special matter in evidence (*p*); and the same privilege is extended by various statutes to constables and officers in cases of actions against them for things done by them by virtue of their offices. The plaintiff must prove that the action was brought within the time limited in that behalf (ante, pp. 635, 636); that the proper notice of action (ante, pp. 636–639) was given; that the cause of action was stated in such notice, and that it arose in the county or place laid as venue in the margin of the declaration; or, when the plaintiff sues in the county court, within the district for which such court is holden. If the act of a magistrate is done without jurisdiction, it is a trespass; if within his jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shown to be malicious (*q*).

Proof of malice and of the want of reasonable and probable cause.—

(*m*) *Staight* v. *Gee*, 2 Stark. 445.
(*n*) *Burley* v. *Bethune*, 5 Taunt. 583.
(*o*) Ante, p. 632. *Pease* v. *Chaytor*, ante, p. 634.
(*p*) 11 & 12 Vict. c. 44, s. 10; ante, pp. 508, 509.
(*q*) Erle, J., *Taylor* v. *Nesfield*, 3 Ell. & Bl. 730.

There is a wide distinction between an action against a prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction and imprisonment thereunder. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence; but in an action against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone, and it is impossible to show that there was no probable cause for the conviction without showing what that evidence was. There may be a malicious prosecution without a malicious conviction, and there may be an unfounded conviction by the magistrate without malice (*r*).

The question as to whether the magistrate has acted in the discharge of his duty with *bona fides*, and with reasonable and probable cause, is a question at the trial for the decision of the judge, and not for determination by a jury (*s*).

A justice's warrant put in by the plaintiff is evidence for the defendant of an information on oath before the justice recited in the warrant. The recital must be considered part of the warrant, and admissible evidence for the defendant, when the warrant is produced against him by the plaintiff, for the purpose of showing on what grounds, and in relation to what subject-matter he was acting when he granted it; in the same manner as if a magistrate were to commit for a felony on his own view, the warrant reciting that he had seen the felony committed when put in evidence against him, would be admissible evidence for him that he had seen the felony committed (*t*).

Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.—If the constable proves that he did the act complained of in the execution of a justice's warrant, he secures, as we have seen, an indemnity from liability, unless it is shown that he did not act in obedience to the warrant, or that he exceeded his authority and did more than the warrant authorised him to do, or that a demand in writing was made at his place of abode by the plaintiff, or his attorney or agent, in manner previously mentioned (ante, p. 629), of the perusal and copy of the warrant, and that the same was

(*r*) *Burley* v. *Bethune*, 5 Taunt. 583.
(*s*) *Kirby* v. *Simpson*, ante, p. 633.
(*t*) *Haylock* v. *Sparke*, 22 Law J., M. C. 71.

refused or neglected to be produced or shown, for the space of six days after demand. If the officer proves that he showed the warrant and gave the party demanding it an opportunity of taking a copy, then, if the action is brought against the officer or his assistants for anything done under the warrant, without making the justices who signed and sealed the warrant defendants, the jury are, on production and proof of the warrant at the trial, to give their verdict for the defendant, notwithstanding any defect of jurisdiction in the justices; and if the action is brought jointly against the justices and officer, or person acting in his aid, then, on proof of the warrant, the jury are to find for the constable or officer, or person acting in his aid, notwithstanding any such defect of jurisdiction (*u*).

By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences if the magistrate acted without authority. One object, therefore, of the legislature was to relieve the officer from that inconvenience, and to provide that, if he acted in obedience to the warrant of the magistrate, he should be protected. That was the object of the 6th section of 24 Geo. 2, c. 44, which makes it necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. It is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant: and in that case the statute gives him an absolute protection, at whatever time the suit may be brought against him (*x*).

Proof of warrant of justices — Secondary evidence of the contents of a warrant.— Where the high constable of a borough, who had been served with a subpœna duces tecum, to produce a warrant under which he had made a levy, stated that he had no doubt he had deposited the warrant in his office; that he had searched for it and could not find it, and did not know what had become of it, and that the town-clerk had access to his office, and might have taken it away, it was held that secondary evidence might be given of the contents of the warrant (*y*).

Proof by the plaintiff of his demand of the perusal and copy of the warrant.—If a plaintiff's attorney, previous to bringing an action against a constable or officer for an imprisonment or seizure of goods by a constable, makes out two papers in writing precisely similar, purporting to be demands of the perusal and copy of the warrant, and signs both for

(*u*) 24 Geo. 2, c. 44, s. 6.
(*x*) Abbott, C. J., *Parton* v. *Williams*, 3 B. & Ald. 332.
(*y*) *Fernley* v. *Worthington*, 1 M. & Gr. 491.

his client, and then delivers one to the defendant, they are both duplicate originals; and the one retained by the attorney may be given in evidence at the trial, without proving any notice to produce the one left in the hands of the defendant. "Unless I am mistaken," observes Lord Eldon, C. J., "it is the usual course in actions of this sort to produce a duplicate original; and the same thing is done with respect to notices to quit. The practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary" (*z*).

Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.—Where the warrant under which the constable acted was lodged in the hands of the gaoler at the time the plaintiff was taken to prison, and the constable proved that when the demand for the perusal of the warrant was made he produced a correct copy of it, telling the party making the demand that the original was in the hands of the gaoler, and no objection was made to the non-production of the original, it was held that there had been a substantial compliance with the requirements of the statute by the officer, so as to entitle him to the benefit of the statutory protection. "The conduct of the agent of the plaintiff," observes Lord Denman, C. J., "was such as to lead to the belief that the delivery of a copy of the warrant, under the circumstances, was all that was required. But for this, steps might have been taken to procure the original; and the plaintiff cannot therefore rely on its non-production to oust the constable of the protection of the statute" (*a*).

Damages recoverable in actions against justices of the peace.—By 11 & 12 Vict. c. 44, s. 13, it is enacted, that where the plaintiff in any action against a justice of the peace, for anything done by him in the execution of his office, shall be entitled to recover, and shall prove the levying or payment of any penalty or money under any conviction or order as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under such conviction or order, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of 2*d.* as damages for such imprisonment, or any costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

(*z*) *Jory* v. *Orchard*, 2 B. & P. 41; ante, p. 630.
(*a*) *Atkins* v. *Kilby*, 11 Ad. & E. 785.

If a magistrate has committed the plaintiff to prison in a case in which he has no jurisdiction, and the conviction is quashed (ante, p. 633), the magistrate is liable for all the usual and ordinary injurious consequences of a conviction and commitment, such as handcuffing, cutting off the hair, immersion in a bath, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but the magistrate is not responsible for any unnecessary or excessive violence on the part of the officers executing the warrant (*b*).

(*b*) *Mason* v. *Barker*, 1 C. & K. 100. And see ante, pp. 517-519, as to damages recoverable in actions for false imprisonment.

CHAPTER XVI.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS—STATUTORY COMPENSATIONS FOR INJURIES AUTHORISED BY STATUTE.

SECTION I.—*Of injuries from the exercise of statutory powers.*—Exemption of parties from personal liability in respect of things done under statutory authority—Negligent exercise of statutory powers—Duties and responsibilities of public boards, trustees, and commissioners, surveyors, contractors, and workmen, acting in the exercise of statutory powers—Acts binding upon parishes—Effect of clauses in particular statutes exonerating parties from all personal liability in respect of things done in the bonâ-fide execution of the statute—Responsibility of parties for negligence notwithstanding the protecting clause—Right of commissioners, trustees, and public officers to indemnify themselves in respect of costs and expenses out of the public funds they are authorised to administer—When expenses incurred through blunders or negligence may be charged upon a public or trust-fund—Injuries from non-repair of authorised public works—Creation of nuisances in the bonâ-fide exercise of statutory powers—Pollution of streams and injuries to docks, wharfs, towing-paths, &c.—Nuisances from the negligent working of railways—Power to take lands and streams for public purposes—Licenses to enter upon land to commence the construction of public works—Seizure of goods in the exercise of statutory powers.

SECTION II.—*Of statutory remedies for the recovery of compensation for injuries authorised by statute.*—Injuries establishing a right to statutory compensation—Ascertaining the amount by arbitration—Damages recoverable before justices—Statutory remedy for the recovery of compensation under the Lands Clauses and Railway Clauses Consolidation Act—Statutory compensation to tenants and occupiers of lands taken for public works—Notices by claimants of the nature and extent of the injury, and the amount of compensation required—Inquisition of damage—Assessment of damage to which the claimant is not legally entitled—Removal of the inquisition by certiorari—Actions for the recovery of compensation—Pleadings, defences, and evidence—Remedy for subsequent unforeseen damage.

SECTION III.—*Remedies by action and by injunction in respect of injuries from the negligent doing of things authorised to be done by statute.*—Limitation of actions in respect of things done under statutory authority—Accrual of the cause of action—Notice of Action—Tender of amends—Parties to be made defendants—Pleadings, defences, and evidence—Injunction to prevent unnecessary injury from the exercise of statutory powers—Injunction to restrain nuisances by public bodies and local boards, and prevent misuse of their property.

SECTION I.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS.

Exemption of parties from personal liability in respect of things done under statutory authority.—An action will not lie on behalf of a plaintiff who

has sustained injury from the execution of powers and authorities given by an act of parliament, those powers being exercised with judgment and caution (*c*). But if the statutory powers are exceeded, or the things authorised to be done are carelessly and negligently done, an action is maintainable for damages (post, s. 3). "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption, that the act creating the damage being within the statute, must be a lawful act" (*d*). Where, therefore, the legislature authorised a railway company to lay down a railway alongside a public highway, it was held that the legislature must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highroad, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway (*e*). And where a railway company was authorised to lay down a railway across a public thoroughfare, and have gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous by reason of trains being near at hand, it was held that a person who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the gates, had no right of action against the railway company for the injury he had sustained. Neither has the owner of an estate any right of action against a railway company for laying down a railway across a turnpike road close to the entrance of his estate under the powers of an act of parliament, by means whereof he is impeded and hindered in going from and returning to his house, and his horses are frightened and become ungovernable from the noise of the trains (*f*).

It has been held, that if a canal company has been authorised by statute to make and use a canal, and the canal is made in the usual manner, and water leaks out and comes upon the plaintiff's premises, without any negligence or breach of duty on the part of the canal company, the company will not be responsible in damages for the injury (*g*); but every canal company is bound to maintain and keep its canal in good order, and manage it so that it may not become a source of injury to the adjoining landowners; and if the water can be prevented from escaping from the

(*c*) Ld. Truro, *Lond. & North-West. Rail. Co.* v. *Bradley*, 3 Mac. & G. 341; 6 Rail. Cas. 551. *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. Ap. 246. *Boulton* v. *Crowther*, 2 B. & C. 706. As to seizure and detention of chattels by custom-house officers in execution of statutory powers, see post.

(*d*) *Duncan* v. *Findlater*, 6 Cl. & Fin. 908.

(*e*) *Rex* v. *Pease*, 4 B. & Ad. 42. But not to unnecessary annoyances, *Manchester & Altr. Rail. Co.*, 2 N. R. (1863), 78.

(*f*) *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. Ap. 229.

(*g*) *Whitehouse* v. *Birm. Can. Co.*, 27 Law J., Exch. 25.

canal, it is the duty of the company to adopt the necessary measures for the purpose (*h*).

If the property of the plaintiff adjoining a railway has been set on fire and destroyed by a spark from a locomotive engine and furnace, which the railway company is authorised by statute to use on their railway, the railway company is *primâ facie* responsible for the damage done, for the acts of parliament authorising railway companies to run locomotive steam furnaces through the country, do not authorise them to scatter sparks or lighted coals upon the adjoining land, to the injury of the proprietors thereof (*i*).

Injuries from the negligent execution of statutory powers.—"Powers given by statute," observes Watson, B., "are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Where, therefore, a canal company was authorised by statute to intersect highways with their canal, carrying the highway over the canal by means of bridges, it was held that they were bound to erect proper and suitable bridges, sufficient for all the requirements of an increasing traffic, and were bound to put up proper lights, fences, and guards for the protection of the public; and that if they erected a swing-bridge, they must use all due and proper precautions for the protection of the public whilst the bridge was open. And if such a bridge is left open by boatmen using the canal, and a passenger traversing the highway falls into the canal and is injured, the canal company will be responsible for the injury in an action for negligence (*k*).

Where a municipal corporation was authorised by statute to lay down gas-pipes, and one of the workmen employed by the corporation in chipping the pipes in a public thoroughfare, caused an iron chip from the pipe to fly into the plaintiff's face and put out his eye, it was held that the corporation was responsible in damages for the injury, although the work was a public work done in the exercise of statutory powers (*l*).

If parties authorised by statute temporarily to close a public highway have by mistake stopped up the wrong thoroughfare, or if they have continued an obstruction in a public thoroughfare beyond the time authorised by statute, and an adjoining householder or shopkeeper sustains a particular injury beyond what is sustained by the public at large; if he loses his customers, or his trade is injured by the unauthorised obstruction, there is a remedy by action for damages (*m*).

(*h*) *Lawrence* v. *Gt. North. Rail. Co.*, 16 Q. B. 653; 20 Law J., Q. B. 293. *Baynall* v. *Lond. & North-West. Rail. Co.*, 31 Law J., Exch. 121.

(*i*) *Freemantle* v. *Gt. North. Rail. Co.*, 31 Law J., C. P. 12. *Vaughan* v. *Taff Vale Rail. Co.*, ante, p. 210.

(*k*) *Manley* v. *St. Helen's Canal & Rail. Co.*, 2 H. & N. 840; 27 Law J., Exch. 164.

(*l*) *Scott* v. *Mayor, &c. of Manch.*, 2 H. & N. 204.

(*m*) *Wilkes* v. *Hungerford Market Co.*, 2 Sc. 462, 463; 2 Bing. N. C. 281.

Where a railway company was authorised to make an embankment for the carrying of their railway across a valley, through which the waste waters from the adjoining land flowed away, and the embankment was made without proper openings and culverts for the passage of the waste water, by reason whereof the flood water was penned back after heavy rains and forced upon the plaintiff's land and injured his crops, it was held that the plaintiff was entitled to an action for damages. "It is contended by the defendants," observes Patteson, J., "that they have constructed their railway according to the provisions of their act of parliament, and that they are not liable for any consequences which may follow to the damage of the plaintiff; and the question is, whether the company are protected by their act? Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think that the want of such caution is sufficient to sustain the action" (*n*). And where a trading company was incorporated by statute for the purpose of manufacturing gas, and was authorised to make gas to light the streets of a town, it was held that the statute did not authorise the company to make gas so as to create a nuisance, and, therefore, that they were liable, notwithstanding the statute, to an action for damages for making gas so as to create a nuisance (*o*).

When powers are given to gas and water companies to open trenches in the streets, they must take care so to exercise those powers as not by negligence to cause injuries to passengers.

Duties and responsibilities of boards of public works, trustees, and commissioners — Contractors and workmen acting in the exercise of statutory powers.— Trustees and commissioners of public works having certain public duties to perform under the authority of a statute, incur no personal responsibility for their acts if they act within the strict line of their duty; but if they order a thing to be done which is not within the scope of their authority (*p*), or are themselves guilty of negligence or misconduct in doing that which they are empowered to do, they render themselves liable to an action. If an action is brought against contractors and workmen who are personally engaged in the execution of public works, under the order or authority of trustees, or a board of public works, and the damage of which the plaintiff complains is the inevitable result of the execution of a public work under statutory authority, the action will fail; but if the damage arises from the negligent execution of the work,

(*n*) *Lawrence* v. *Gt. Northern Rail. Co.*, 16 Q. B. 653, 654; 20 Law J., Q. B. 293. *Broadbent* v. *Imp. Gas Co.*, 26 Law J., Ch. 281. *Blagrave* v. *Waterworks Co.*, 1 H. & N. 369. *Sutton* v. *Clarke*, 6 Taunt. 42. *Grocers' Co.* v. *Donne*, 3 Sc. 357. *Brine* v. *Gt. West. Rail. Co.*, 31 Law J., Q. B. 101. *Bagnall* v. *Lond. & North-West. Rail. Co.*, ante, p. 648.

(*o*) *Broadbent* v. *Imp. Gas-light Co.*, 26 Law J., Ch. 280.

(*p*) *Reg.* v. *Knight*, 8 W. R., Q. B. 294.

and might have been avoided by the exercise of proper skill and care, the contractors and workmen will be personally answerable for the damage done (*q*).

Where an action was brought by the plaintiff against one of several trustees under a turnpike act, who had joined in an order made by the trustees for cutting a drain through certain lands, whereby considerable damage had been done to the plaintiff's estate, and it appeared that the trustees had acted in the execution of statutory powers, in the best mode they could, under competent advice, and in the faithful execution of the duties imposed upon them by the legislature, it was held that they were not personally responsible for the damage done (*r*); but where the act authorised to be done by the trustees is done so carelessly and improperly that the careless or improper manner in which it is done either increases the damage or creates it, then the trustees will be liable, if the work has been done by their own servants, or persons acting under their immediate orders. Where the trustees of a public road covered over an open drain by the roadside, and thereby caused an accumulation of water in the road, which flooded the adjoining land, and ran into and swamped the plaintiff's colliery, it was held that the trustees were responsible in damages for the injury (*s*).

If the act done is in itself lawful, it can only become unlawful in consequence of the negligent and improper manner in which it is executed (*t*).

When commissioners intrust the execution of public works to contractors, engineers, and surveyors, who select their own workmen for the execution of the work, the commissioners are not personally liable for the mistakes or negligence of the contractors, engineers, or workmen. "Few commissioners know how such works should be executed; they ought not, therefore, to be answerable for an imperfect execution of them; nor can it be expected that they shall attend, day by day, to see that proper precautions are taken against accidents, or get up in the night to see that lights are burning to warn passengers of their danger from temporary obstructions. If by taking their office of commissioners they have not undertaken the performance of these duties, with what justice can they be charged with the consequences of the neglect of them? No action can be maintained against a man acting gratuitously for the public, for the consequence of any act which he was authorised to do, and which, as far as he is concerned, is done with due care and attention; and such a

(*q*) *Jones* v. *Bird*, 5 B. & Ald. 837. *Clothier* v. *Webster*, C. B., N. S.; 31 Law J., C. P. 317.

(*r*) *Sutton* v. *Clarke*, 6 Taunt. 42. *Grocers' Co.* v. *Donne*, 3 Sc. 357; 3 Bing. N. C. 34.

(*s*) *Whitehouse* v. *Fellowes*, 30 Law J., C. P. 305.

(*t*) *Boulton* v. *Crowther*, 2 B. & C. 709. *Governor, &c. of Cast Plate* v. *Meredith*, 4 T. R. 796.

person is not answerable for the negligent execution of an order properly given to others" (*u*).

Trustees of turnpike-roads, in whom the soil of the highway is not vested, and who are not in possession thereof (ante, p. 235), are not personally responsible for the negligence of contractors and others employed by them in the repair of the roads, unless they personally interfere in the management of the works (*x*). Where certain trustees of a public road were empowered by act of parliament to place lamps along the road, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch it, and certain labourers employed in cleaning the road left some scrapings in round heaps at the side of the road which became hard, and no lights being placed to light the road, the plaintiff stumbled over one of these heaps and was injured, it was held that the trustees were not personally responsible for the injury (*y*).

But if trustees and commissioners of public works, acting within their jurisdiction, and exercising powers given them by act of parliament, act wantonly and oppressively, and do unnecessary injury to individuals, they are personally responsible in damages to the parties injured. Thus, where an action was brought against certain commissioners of pavements for so raising a pavement as to obstruct the plaintiff's doors and windows, and it appeared that the commissioners were acting in the exercise of statutory powers, but that proper advice had not been taken, and the works were improperly executed, and the injury done to the plaintiff might have been readily avoided by laying down the pavement in a proper manner, it was held that the commissioners were personally responsible in damages for the nuisance they had unnecessarily and wantonly created (*z*).

Public commissioners and trustees who continue in the actual occupation of public works constructed and maintained for the use of the public, and in receipt of the tolls levied for the use thereof, are bound, as we have seen, to maintain and manage their property so that it may not become a source of danger to those who are invited to use it (*a*). But if they have demised the property to a lessee, who is in the actual use and occupation of it, and in receipt of the tolls, it is not then the duty of the commissioners or trustees to maintain the works in a safe and secure state, unless the particular statute under which they act imposes that duty upon them (*b*). The liability of trustees and commissioners,

(*u*) Best, C. J., *Hall* v. *Smith*, 9 Moore, 235, 238. *Holliday* v. *St. Leonard, Shoreditch*, 30 Law J., C. P. 361; 11 C. B., N. S. 192; ante, pp. 342–344.

(*x*) *Humfreys* v. *Mears*, 1 M. & R. 187. *Duncan* v. *Findlater*, 6 Cl. & Fin. 894.

(*y*) *Harris* v. *Baker*, 4 M. & S. 29.

(*z*) *Leader* v. *Moxon*, 2 W. Bl. 926; 3 Wils. 461.

(*a*) *Gibbs* v. *Trust. Liv. Docks*, 27 Law J., Exch. 321; 3 H. & N. 164; ante, pp. 154, 155, 169, 175.

(*b*) *Walker* v. *Goe*, 3 H. & N. 395; 27 Law J., Exch. 427; ante, pp. 169, 170.

however, acting in the execution of statutory powers, will depend upon the provisions of the special act of parliament from whence they derive their authority, the nature of the duties imposed upon them by statute, and the existence or non-existence of a public fund in their hands or at their disposal, applicable to the liquidation of any expenses they may incur in the *bonâ-fide* discharge of their public duties (*c*). Whenever an act of parliament imposes upon commissioners, or upon any public body, the duty of repairing a highway or any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body, whether they have or have not funds at their disposal for effecting the repairs; though, if there be no funds, there may be a difficulty in the way of the plaintiff's getting his damages (*d*).

Whenever injury is sustained from the non-repair of water-pipes, fire-plugs, drains, or works erected for the use or accommodation of the public, the liability to make compensation for the injury arising from such neglect rests with the parties upon whom the duty of repairing is imposed (*e*).

Surveyors of highways and county bridges are not responsible in damages to travellers who have sustained injury from the highway or bridge being out of repair (*f*). The proper remedy for the non-repair of a highway is against the parish, but a surveyor of highways is responsible, like any other person, for any negligent act of his own, creating a nuisance, and causing injury to another (ante, p. 342).

Acts binding upon parishes—Resolutions of vestries.—The only legitimate way in which a parish can do an act is by convening a vestry, and duly conducting the proceedings therein to their legitimate termination, by show of hands, or by a poll, when a poll is duly demanded. If, therefore, a poll is demanded and refused, and a resolution carried by show of hands, the resolution so carried cannot be safely acted upon as being the resolution of the parish, for a ratepayer has a right, at common law, to obtain the sense of the parish by means of a poll, and this right cannot be taken away by any general words in a statute respecting the taking the sense of a vestry (*g*).

Effect of clauses in particular statutes exonerating parties from all personal liability in respect of things done in the bonâ-fide execution of the statute.—By s. 140 of the Public Health Act, 1848 (11 & 12 Vict. c. 63),

(*c*) *Metcalfe* v. *Hetherington*, 11 Exch. 257; 24 Law J., Exch. 318; qualified and corrected by *Young* v. *Davis*, 31 Law J., Exch. 256.

(*d*) *Hartnall* v. *Ryde Improve. Commissioners*, 8 L. T. R., N. S. 574.

(*e*) *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 Law J., Exch. 57.

(*f*) *Young* v. *Davis*, 31 Law J., Exch. 250; 11 W. R. 735, Exch. Ch. *M'Kinnon* v. *Penson*, 9 Exch. 609.

(*g*) *White* v. *Steele*, 12 C. B., N. S. 408; 31 Law J., C. P. 265.

it is enacted, that no matter or thing done by the local board of health, nor by any superintending inspector, or any member of the local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting under the direction of the local board, shall, if the matter or thing were done *bonâ fide* for the purpose of executing the act, subject them, or any of them personally, to any action, liability, claim, or demand whatsoever, and any expense incurred by such local board, member, officer of health, &c., acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of the act.

Similar provisions are to be found in other statutes respecting matters or things done by commissioners, or by any clerk, surveyor, or other officer, or person acting under the direction of such commissioners, and, in some cases, the saving clause is added, "unless the action, suit, damages, costs, and charges have arisen in consequence of wilful neglect or default on the part of the commissioners, or person incurring the same."

The effect of clauses of this sort is not to leave a complaining party remediless, but to oblige him to bring his action against the public board, or against the commissioners as a body, in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of the funds at their disposal under the provisions for the payment of damages and costs, recovered in any such action against the clerk (*h*). Thus, where certain commissioners for the improvement of a town, acting under the powers of the Public Health Act, made a new sewer communicating with the plaintiff's drain, and neglected to take proper precautions to prevent the plaintiff's premises from being flooded by storm waters, and by inundations from an adjoining river, which communicated with the new sewer, it was held that the plaintiff was entitled to maintain an action against the clerk of the commissioners, for the recovery of all the damage he had sustained by reason of the negligence of the commissioners, and that these damages were to be paid out of the rates levied under the act (*i*).

Responsibility of parties for negligence, notwithstanding the protecting clause.—But protecting clauses of this sort do not exempt contractors and workmen from personal liability in respect of the negligent performance of work intrusted them to execute. Where there is no negligence, a party doing the act in obedience to the commissioners or the board would be properly absolved, and the board would have to make compensation; but if he has been guilty of negligence in doing the act, and damage ensues, he is personally liable for the consequences, notwithstand-

(*h*) *Ward* v. *Lee*, 7 Ell. & Bl. 430; 26 Law J., Q. B. 142. *Southampton & Itchin Bridge Co.* v. *Local Board, &c.*, 8 Ell. & Bl. 812; 28 Law J., Q. B. 41; post, s. 2.

(*i*) *Ruck* v. *Williams*, 3 H. & N. 308; 27 Law J., Exch. 357. *Allen* v. *Hayward*, 7 Q. B. 960. *Gt. West. Rail. Co. Can.* v. *Braid*, 9 Jur. N. S. 339.

ing the statute, for he cannot pretend that negligence was ordered or directed by the commissioners or board (*k*).

Right of commissioners, trustees, and public officers to indemnify themselves in respect of the costs and expenses they incur out of the public funds they are authorised to administer.—Wherever a duty is imposed by statute upon public officers, and costs incidentally arise in questioning the propriety of acts done in the fulfilment of that duty, the commissioners and public officers have a right to defray those expenses out of the funds they are authorised to administer, and they may in general levy a rate to defray such expenses (*l*). And wherever necessary expenses are incurred in the execution of a trust, or in the performance of duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust (*m*). But the expenses must be such as have been legitimately and properly incurred by the persons intrusted with the administration of the fund in the *bonâ-fide* discharge of the duties imposed upon them. If they embark in reckless litigation, or exceed the powers and authorities conferred on them by the statute, or are guilty of any wilful personal misconduct in incurring the expenses they have incurred, they cannot charge them on the public funds at their disposal, for funds raised under the authority of a statute are liable only for acts done strictly in pursuance of the directions of that statute, and cannot be applied in satisfaction and discharge of liabilities arising from wilful misconduct, gross mistake, or wilful neglect of duty. "Such damages are to be paid out of the pocket of the wrong-doer, and not from a trust-fund" (*n*).

When expenses incurred through blunders or negligence may be charged upon a public or trust-fund.—In respect of all acts *bonâ fide* done by commissioners or local boards acting in the execution of the Public Health Act and divers statutes for the improvement of towns and the construction of public works, but erroneously done, and causing damage to others, the commissioners or members are liable, and the expenses they are put to in consequence thereof they have authority to discharge out of the public funds. "It is said," observes Lord Campbell, "that it is a great hardship on the ratepayers to be made to pay for the blunders or negligence of the board. That objection, however, seems to be met by the consideration that the members of the board are elected by the ratepayers, and

(*k*) *Arthy* v. *Coleman*, 6 W. R., Q. B. 35; 30 Law T. R. 101. *Newton* v. *Ellis*, 24 Law J., Q. B. 337.

(*l*) *Rex* v. *Commissioners, &c. for Tower Hamlets*, 1 B. & Ad. 232. *Rex* v. *Essex*, ante, p. 629.

(*m*) *Att.-Gen.* v. *Mayor of Norwich*, 2 Myl. & Cr. 425. *Lewis* v. *Mayor, &c. of Rochester*, 30 Law J., C. P. 169.

(*n*) *Duncan* v. *Findlater*, 6 Cl. & Fin. 908. *Heriot's Hospital Feoffees* v. *Ross*, 12 Cl. & Fin. 513.

are, therefore, their representatives; and there would be greater injustice, perhaps, if it were held that persons injured by the negligence or wrongful acts of the board had no remedy" (*o*). Expenses, however, which have been caused by wilful misconduct, or wilful neglect of duty, and which have not been incurred in the *bonâ-fide* execution of the statute, cannot, of course, be charged upon the trust-fund (ante, p. 654).

Injuries from the non-repair of authorised public works.—When the authorised works have been constructed, the parties clothed with the possession of them are bound to maintain them in a proper state of security; and if they are unable to do so from want of funds, or from causes over which they have no control, it is their duty to close the works to the public, or give notice of their dangerous condition; for if they invite or encourage persons to use them, with knowledge that they will incur peril in so doing, and injuries are sustained from the dangerous condition of the property, they, or the funds they administer, will be answerable in damages for neglect of duty (*p*).

Creation of nuisances in the bonâ-fide exercise of statutory powers.—Where certain contractors, acting under the directions of the Metropolitan Commissioners of Sewers, altered a sewer communicating with the plaintiff's drain; and thereby caused a nuisance to the plaintiff, for which he brought an action against the contractors, and the jury, in answer to a question left them by the judge, found that the contractors had, in making the sewer, acted *bonâ fide* under the orders and directions of the commissioners, it was held that the contractors were absolved from all personal liability for the nuisance. "The object of the legislature," observes Wightman, J., "seems to have been in such a case not to leave the complaining party remediless, but to oblige him to bring his action against the commissioners as a body in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of funds at their disposal under the provisions of the 125th section, which provides for the payment of the damages and costs recovered against the clerk in any such action (*q*). Here there was no evidence of any negligence on the part of the contractors, the sewer having been properly constructed by them under the orders of the commissioners, and the nuisance to the plaintiff being the natural and necessary result of the making of the sewer.

Wherever the mischief is the natural and necessary result of the doing of the act ordered to be done, and not the result of some collateral or negligent act not ordered, the maxim *respondeat superior* applies (*r*).

(*o*) *Southampt. &c. Bridge Co.* v. *Local Board, Southampt.*, 8 Ell. & Bl. 812; 28 Law J., Q. B. 41.

(*p*) *Gibbs* v. *Trust. Liv. Docks, Manley* v. *St. Helen's Can. Co., Mersey Docks* v. *Penhallow, Thompson* v. *North-East. Rail. Co.*, ante, p. 154.

(*q*) *Ward* v. *Lee*, ante, p. 653.

(*r*) *Hole* v. *Sittingbourne, &c. Rail. Co.*, 30 Law J., Exch. 81.

Pollution of streams and injuries to docks, wharfs, towing-paths, &c., in the exercise of statutory powers.—By the Public Health Act (11 & 12 Vict. c. 63), s. 145, it is enacted, that nothing contained in the act shall be construed to authorise a local board of health to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained. Where, therefore, a local board of health constructs drainage works and pours the filth from public sewers into streams or watercourses running through the private grounds of adjoining landowners, they cannot shelter the ratepayers or the public funds at their disposal from the consequences of the creation of the nuisance by showing that they acted in the exercise of the statutory powers conferred upon them (*s*).

Although the inhabitants of a town may have a right to open their sewers into a river in the natural course of drainage, this does not entitle them to foul the water with the contents of water-closets, and convert a sweet and limpid stream into a stinking sewer. The ordinary right of sending house-drainage into streams and natural watercourses, is like the right of drainage which exists in the case of adjoining mines upon different levels. "From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of an adjoining mine upon a higher level descend upon his mine, so long as it descends in the natural course of drainage (ante, p. 44); but that does not entitle the owner of the adjoining mine to throw upon him, in some other and more objectionable way, water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property" (*t*).

Nuisances from the negligent working of railways.—It does not follow that because a railway company is authorised to carry its railway across or alongside a public carriage-road, that it is thereby authorised to conduct its traffic so as to create a nuisance. The company is not responsible for unavoidable noises caused by its engines (*u*); but if the engine-driver unnecessarily puts on the whistle, or unnecessarily lets off steam, or discharges mud or water when crossing or running alongside a public carriage-road, and by so doing frightens horses lawfully traversing the highway, and causes them to upset a carriage, the railway company will be responsible for the damage done (*x*).

Creation of nuisances in the exercise of the statutory powers contained in

(*s*) *Attorney-Gen.* v. *Luton Local Board*, 2 Jur. N. S. 180. *Manchester, Sheff. &c. Rail. Co.* v. *Worksop Board of Health*, 23 Beav. 198.

(*t*) Wood, V. C., *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 542.

(*u*) *Rex* v. *Pease*, 4 B. & Ad. 30.

(*x*) *Manch. & Altring. Rail. Co.* v. *Fullarton*, 2 N. R. (1863), 78; ante, p. 21.

the Towns Improvement Clauses Act.—By 10 & 11 Vict. c. 34, s. 24, power is given to commissioners and public bodies intrusted with the execution of the powers of the act, to construct sewers for the drainage of towns, and to carry such sewers through inclosed and other land, making full compensation to the owners and occupiers thereof, and to cause such sewers to empty themselves into the sea or any public river, or to cause the refuse from such sewers to be conveyed to a convenient site for sale, for agricultural or other purposes, but *so that the same shall in no case become a* NUISANCE. And by s. 107 it is further enacted, "that nothing in the act contained shall be construed to render lawful any act or omission on the part of any person which is, and but for the act would be, deemed to be a nuisance at common law." If, therefore, commissioners, trustees, or any body corporate, intrusted with the exercise of the powers of this statute, create a nuisance by their system of drainage, they will render themselves, or the public funds at their disposal, responsible for the damage done (*y*).

The Metropolis Local Management Act (18 & 19 Vict. c. 120) provides (s. 86), that where any work by any vestry or district board, done, or required to be done, in pursuance of the provisions of the act, interferes with, or prejudicially affects, any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner thereinafter provided; or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of such mill, or any such right connected therewith, or other right to the use of water.

If any vestry or district board, in the exercise of the powers conferred upon them by this statute, cause work to be done which is negligently and unskilfully done, and damage is thereby caused to another, it is a proper case for an action or an injunction; but if the work is properly done, and the injury is the natural and necessary result of the doing of the work, it is then a proper case for the statutory compensation (*z*).

Of the power to take lands and streams for public purposes.—By the Waterworks Clauses Act (10 & 11 Vict. c. 17) it is enacted (s. 6), that where by the special act the undertakers shall be empowered to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special act, or injuriously affected by the construction or

(*y*) *Attorney-General* v. *Borough of Birmingham*, 4 Kay & J. 543.

(*z*) *Stainton* v. *Woolrych*, 23 Beav. 233; 26 Law J., Ch. 300. *Coats* v. *Clarence Rail. Co.*, 1 Russ. & M. 181.

maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers, the amount, except where otherwise directed, to be determined in the manner provided by the Lands Clauses Consolidation Act. If, therefore, a company, under the powers conferred by this statute, takes the whole stream, it must pay the whole price of it; if it injuriously affects it, compensation must be made in the ordinary way.

Before an entire stream can be taken, the company must proceed to have the amount of compensation assessed, and paid or deposited, or security given, in the mode prescribed by the statute; and the court will by injunction restrain them from diverting the stream unless they have complied with the statutory requirements (*a*).

If a company or public board, acting under the powers of the Lands Clauses Act, require only part of a building, &c., they may be compelled to take the whole, and have the value thereof assessed, and paid into court before they take possession of part (*b*). All fixtures, whether they be tenant's or landlord's fixtures, form part of the premises which the company may be required to value and take (*c*).

Licenses to enter upon land authorised to be taken for public works.—Where the owners and occupiers of land authorised to be taken for public works have licensed the entry of a public board or company for the purpose of commencing the construction of the works, they cannot revoke the consent once given and treat their licensees as trespassers, but must resort to the statutory remedy for compensation (*d*).

Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.—Revenue-officers, acting under an authority given them by statute to examine goods and merchandise, in order to ascertain the amount of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority on the part of the officers. If they, fairly and honestly believing that goods are liable to seizure, take and detain them, and the decision of the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and

(*a*) *Ferrand* v. *Mayor, &c. of Bradford*, 2 Jur. N. S. 175.

(*b*) *Giles* v. *Lond. Chat. &c. Rail. Co.*, 30 Law J., Ch. 603.

(*c*) *Gibson* v. *Hammersmith Rail. Co.*, 32 Law J., Ch. 337.

(*d*) *Doe* v. *Leeds & Bradford Rail. Co.*, 16 Q. B. 796; 20 Law J., Q. B. 486. *Knapp* v. *Lond. Chat. & Dov. R. Co.*, 32 Law J., Exch. 236.

passed (*e*). By 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any information or suit shall be commenced or brought to trial on account of the seizure of any vessel, boat, or goods, &c., as forfeited by any act relating to the customs, wherein a verdict shall be found for the claimant, and it shall appear to the judge or court, before whom the same shall have been tried, that there was a probable cause of seizure, such judge or court shall certify on the record that there was such probable cause, and in such case the person making the seizure shall not be liable to an action on account of such seizure.

SECTION II.

OF STATUTORY REMEDIES FOR THE RECOVERY OF COMPENSATION FOR INJURIES AUTHORISED BY STATUTE.

Injuries establishing a right to statutory compensation.—Compensation under acts of parliament authorising the execution of public works which may be productive of injury to private individuals can, in general, only be recovered in those cases where, except for the act of parliament, an action for damages would be maintainable. Where, therefore, the New River Company, in the exercise of its statutory powers, constructed some underground works which drew off the water from the plaintiff's well, it was held that the plaintiff was not entitled to compensation under the statute, as the company, in drawing off the water from the well, had not infringed any right of the plaintiff, or done anything which would have rendered them liable to an action at common law, independently of the statute (*f*).

Of ascertaining the amount of statutory damage by arbitration.—Most of the acts of parliament authorising the execution of public works which may be productive of injury to private individuals, direct compensation to be paid to all persons who have suffered injury from the execution of the authorised works, and direct the amount of compensation in certain cases, if the amount is disputed, to be referred to arbitration. The reference to arbitration is in many cases made compulsory, for if one party refuses to appoint an arbitrator the other may do so alone. But that is confined to disputes as to amount, and not to the question of

(*e*) *Jacobsohn* v. *Blake*, 7 Sc. N. R. 784; 13 Law J., C. P. 89; ante, p. 500. As to detention for freight, see 22 & 23 Vict. c. 37, s. 2; ante, p. 319.

(*f*) *New River Co.* v. *Johnson*, 29 Law J., M. C. 93; 8 W. R., Q. B, 179; 1 Law T. R., N. S. 295. *Reg.* v. *Metrop. Board, &c.*, 32 Law J., Q. B. 105; 8 Law T. R., N. S. 239.

liability to make compensation. If that is denied altogether, the question must be referred to the regular tribunals (*g*). An arbitrator has no jurisdiction to determine upon the question of liability, or any question of damage distinct from the damage naturally resulting from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to him to decide upon (*h*). The award, therefore, merely settles the amount to be recovered, and if the defendant refuses to pay on the ground that he is not liable, the plaintiff must enforce his claim by action, and not by an application to the court to enforce the award (*i*).

The Public Health Act, 1848, s. 144, gives a right of full compensation to all persons sustaining damage by reason of the exercise of any of the powers of the act, and directs that in case of dispute as to the amount the same shall be settled by arbitration. Under the powers of this statute a local board made a sewer, and in so doing cut a trench through the claimant's land, and the local board contended that no damage had been thereby done to the claimant, but the claimant contended that he had sustained damage, and was entitled to compensation, and it was held that this clearly was a dispute as to the amount of compensation to be settled by arbitration, and that if the arbitrator found the damage nominal or infinitesimally small, he might find the amount of compensation to be nil (*k*). But when there is a dispute as to whether the act complained of was done by the local board, or as to some matter of fact which would, if found for the local board, show that there was no liability to make compensation, then the dispute is not within the jurisdiction of the arbitrator.

Damages recoverable before justices of the peace, and not by action.— When an act of parliament authorising the doing of an act which has been productive of injury to another provides that if the parties cannot agree upon the amount of compensation, the same shall be settled and ascertained by order of one or more justices of the peace, &c., the parties are confined to the specific remedy given by the statute, and have no choice of any other tribunal to settle the amends in any case within the act (*l*); but if the powers of the act have been exceeded, or the thing authorised to be done has been negligently or carelessly done, and the damage is the result of negligence, then an action for damages must be brought, and the matter is not within the cognizance of the statutory tribunal appointed for settling the amount of statutory compensation (*m*).

Under the Towns Improvement Clauses Act (10 & 11 Vict. c. 34),

(*g*) *Reg.* v. *Metrop. Com.* 1 El. & Bl. 702.

(*h*) *Re Byles*, 11 Exch. 464.

(*i*) *Newbolt* v. *Metrop. Rail. Co.*, 2 N. R., C. P. 168. *Reg.* v. *Lond. & North-West. Rail. Co.*, post, p. 664.

(*k*) *Bradby* v. *Southampt. Local Board of Health*, 4 Ell. & Bl. 1018.

(*l*) *Boyfield* v. *Porter*, 13 East, 208.

(*m*) *Clothier* v. *Webster*, 12 C. B., N. S. 790; 31 Law J., C. P. 316. *Whitehouse* v. *Fellowes*, ante, p. 650.

the Railway Clauses Consolidation Act (8 Vict. c. 20), the Metropolis Local Management Act (18 & 19 Vict. c. 120), and other statutes authorising the construction of public works, it is provided that certain statutory expenses therein specified may be recovered as damages; and by other sections of these statutes it is provided, that when damages are to be paid they are to be ascertained before justices. These clauses creating the right and providing a specific remedy, impose upon the parties seeking to avail themselves of the provisions of the statute the obligation of following the particular remedy given, and no other (*n*), unless the statutory remedy does not extend to and cover the whole right (*o*).

Giving an appeal to the court of quarter sessions will not oust the Queen's courts of their jurisdiction (*p*).

Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Act.— The statute 8 & 9 Vict. c. 18, commonly called the Lands Clauses Consolidation Act, 1845, consolidates into one act certain provisions to be thereafter incorporated into acts of parliament, relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of, or parties interested in, such lands, for any damage that may be sustained by them by reason of the execution of the works authorised by statute. If the claim for compensation by such persons is under 50*l.*, it is to be settled (s. 22) by two justices; if it exceeds 50*l.*, the claimant may elect (s. 23) to have it settled by arbitration, or by the verdict of a jury (ss. 24–49). The General Compensation Clause (s. 68) provides that if any party shall be entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds 50*l.*, such party may have the same settled by arbitration or the verdict of a jury, as he shall think fit. And if lands required or taken for the purposes of the undertaking, or injuriously affected thereby, are in the possession of a person having no greater interest therein than that of a tenant from year to year, and such person be required to give up possession of the whole or of part of such lands before the expiration of his interest therein, the amount of compensation is, if the parties differ, to be settled (s. 121) by two justices. The general words of the 68th section of the statute, therefore, are restricted by s. 121, so that the proceeding in cases falling within the latter section must be in the mode there prescribed (*q*). But where no part of the land

(*n*) *Mayor, &c. of Blackburn* v. *Parkinson*, 28 Law J., M. C. 7.

(*o*) *Shepherd* v. *Hills*, ante, p. 34.

(*p*) *Leader* v. *Moxon*, 2 W. Bl. 924; 3 Wils. 461; ante, p. 620.

(*q*) *Reg.* v. *Manchr. &c. Rail. Co.*, 4 Ell. & Bl. 103. *Knapp* v. *Lond. Chat. & Dov. R. Co.*, 32 Law J., Exch. 236.

of a tenant from year to year is required to be given up, but is merely injuriously affected by the execution of the works of a railway, the claim to compensation is regulated by s. 68 of the statute, and does not come within the restrictive operation of s. 121 (*r*).

By another statute (8 & 9 Vict. c. 20), commonly called the Railway Clauses Consolidation Act, consolidating into one act sundry provisions to be introduced into acts of parliament thereafter passed, authorising the construction of railways, it is provided (s. 6), that in exercising the power given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the company, the amount of compensation to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act.

The statutory remedy provided by these acts of parliament is substituted in lieu of the ordinary remedy by way of action, so that parties aggrieved by anything done in the exercise of the powers granted by the statute must follow the statutory remedy, and cannot resort to an action for damages (*s*). The fact of the claimant being entitled to the compensation he seeks is a condition precedent to his right to avail himself of the machinery provided by s. 68 of the Lands Clauses Consolidation Act. If, therefore, the claimant has no title to compensation, the whole proceedings before the arbitrator or a jury are *coram non judice.*

In cases of railway compensations, it has been held that the occupier of a house and shop adjoining a railway is entitled to the statutory compensation for damage sustained by him in consequence of the dust and dirt from the railway works having penetrated his shop and damaged his goods, and driven away his customers (*t*), or from the beer in his cellar being disturbed and clouded, and rendered unfit to drink, from the vibration caused by the passing trains (*u*), or from the stoppage or diversion of a public thoroughfare, preventing customers from coming to his shop, or from obstructing the access of light and air to ancient windows, provided in all these cases that the act causing the injury has been

(*r*) *Somers, in re*, 31 Law J., Q. B. 261.

(*s*) *Watkins* v. *Gt. Northern Rail. Co.*, 16 Q. B. 968. *Jolly* v. *Wimbledon, &c. Rail. Co.*, 31 Law J., C. P. 96. *Chamberlain* v. *West End, &c. Rail. Co.*, 31 Law J., Q. B. 201.

(*t*) *East & West Ind. Docks, &c. Co.* v. *Gattke*, 3 Mac. & G. 155; 20 Law J., Ch. 217; 6 Rail. Cas. 371. *South Staff. Rail. Co.* v. *Hall*, ib. 400.

(*u*) *Lond. & North-Western Rail. Co.* v. *Bradley*, 6 Rail. Cas. 556; 3 Mac. & G. 336.

authorised to be done by act of parliament, and has been judiciously and carefully done in the exercise of the statutory powers.

Wherever real property is depreciated in value by the construction of a railway, and the depreciation is caused by that being done which, but for the powers contained in the act of parliament, would have been actionable as between the landowner and the company, that is a case for compensation under the provisions of the statute, and for the adoption of the statutory remedy, to the exclusion of an action at common law. Thus, if a private way of the landowner has been obstructed, or his enjoyment thereof infringed or rendered less convenient, by reason of the private way being crossed by a railroad, and obstructed by railway-gates, or the means of access to his house or land from the highway has been rendered less convenient, and the premises rendered less suitable for shops, a case for the statutory compensation is made out (*x*); but where a public turnpike-road is crossed by a railway, and no special damage has been sustained thereby, and no greater injury or inconvenience suffered by a complaining party than that which is common to all the Queen's subjects passing along such public highway, there is no ground for statutory compensation, and no action for damages is maintainable (*y*).

Of statutory compensations to tenants and occupiers of lands taken for public works. — In the case of lands under lease required for railways or undertakings of a public nature, it is enacted (8 & 9 Vict. c. 18), that every lessee shall be entitled to receive compensation for damage done to him in his tenancy by reason of the severance of his land for the purposes of the undertaking or otherwise, by reason of the execution of the works authorised by statute, and that if any such lands be in the possession of any person having no greater interest therein than as a tenant from year to year, and such person be required to give up possession before the expiration of his interest, he shall be entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required, compensation for damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same. A lessee, therefore, who has been obliged to give up his house and business for the purpose of a railway, is entitled to compensation for the loss he sustains in giving up his business, until he can get other suitable premises for carrying it on (*z*).

(*x*) *Glover* v. *North Staff. Rail. Co.*, 16 Q. B. 923. *Moore* v. *Gt. South & West. R. Co.*, 10 Ir. C. L. Rep. 46. *Chamberlain* v. *West End of London, &c. Rail. Co.*, 32 Law J., Q. B. 173. *Senior* v. *Metrop. Rail. Co.*, 32 Law J., Exch. 25.

(*y*) *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. Ap. 23.

(*z*) *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443. *Chamberlain* v. *West End, &c. Rail. Co.*, 31 Law J., Q. B. 201.

Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required.—Every owner and occupier of land who has sustained injury, or whose land has been injuriously affected by the execution of works of a public nature authorised by statute, must give notice in writing to the railway company, declaring whether he desires a settlement by arbitration or by the verdict of a jury, stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount claimed by him. If he desires an arbitration and gives the requisite notice, and the compensation claimed is not paid or agreed to be paid, he will be entitled to have the amount of the compensation settled by arbitration, pursuant to the provisions of the statute (*a*). If, on the other hand, he desires to have the amount of compensation settled by the verdict of a jury, and gives the requisite notice (s. 68), and the amount claimed is not paid or agreed to be paid, the railway company is bound, within twenty-one days after the receipt of the notice, to direct the sheriff to summon a jury for settling the amount of compensation in the manner provided by the statute, and in default thereof the company is liable to pay to the party injured the amount of compensation claimed, and the same may be recovered by action in any of the superior courts (*b*).

Where the owner of land taken by a railway company gave notice under s. 68 of this statute of his desire to have the amount of compensation settled by a jury, and before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff to summon a jury, the owner gave a second notice of his desire to have the question settled by a special jury under s. 54, which fixes no time for the issuing of the warrant, it was held that the company were bound to issue their warrant for the special jury within twenty-one days after the receipt of the first notice, or pay the compensation claimed (*c*).

Evidence on the trial of the inquisition before the sheriff's jury.—It is not competent to the sheriff's jury to determine the right of a claimant to compensation. It is for the court to decide upon the right or title of the party to be compensated, and for the jury to settle the amount, so that the amount has to be tried first and the title last (*d*). Neither the jury nor an arbitrator has any jurisdiction to inquire into collateral matters, creating a head of damage distinct from the damage flowing from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to them for their decision (*e*).

(*a*) 8 & 9 Vict. c. 18, ss. 25–37; ante, p. 659.

(*b*) 8 & 9 Vict. c. 18, s. 68.

(*c*) *Glyn* v. *Aberdare Rail. Co.*, 6 C. B., N. S. 359; 28 Law J., C. P. 271; 7 W. R., C. P. 443.

(*d*) *Reg.* v. *Lond. & North-West. Rail. Co.*, 3 Ell. & Bl. 465. *Read* v. *Vict. & Pim. Rail. Co.*, 32 Law J., Exch. 170. *Horrocks* v. *Metrop. Rail. Co.*, ib. Q. B.

(*e*) *Re Byles*, 11 Exch. 464; 25 Law J., Exch. 53.

Assessment of future contingent damages.— The jury have no right to assess prospective damages, unless there be an actually existing cause of damage proved before them. The provision respecting future damage is, that the jury shall assess the sum of money to be paid by way of recompense for the future temporary or perpetual continuance of any recurring damage which shall have been occasioned by the exercise of the powers thereby granted. A cause of damage, therefore, must exist in some work of the company already done, to give the jury the power of computing the future damage. They then know what the injury is at present, how often it may accrue, and from these data they have the power of making a contingent assessment of damages. When no injury has been actually done, there is nothing in respect of which future damages can be assessed (*f*). When the amount of damage to be sustained in future years is not capable of being ascertained, and depends upon a variety of contingencies which may or may not occur, the compensation cannot be assessed at once and for ever in respect of this future contingent injury. But when it is capable of being known and estimated, it ought to be brought forward, and the amount of compensation assessed at once and for ever (*g*).

The cases relating to railways seem to establish that compensation is given in respect of the calculable damage caused, or to be caused, in or by the execution of the permanent works of the company authorised by the statute, such as obstructing ways, injuring lights, and not the uncertain prospective damage or injury which may or may not result from the use of the railway after it has been constructed (*h*). Thus, where the plaintiff and a railway company, before a railway was constructed, referred to arbitration the sum to be paid by the company for the purchase of part of the plaintiff's land, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages (*i*).

(*f*) Parke, B., *Lee* v. *Milner*, 2 M. & W. 841.

(*g*) *Rex* v. *Leeds & Selby Rail. Co.*, 3 Ad. & E. 690. *Reg.* v. *Aire & Calder Nav. Co.*, 30 Law J., Q. B. 337. *Croft* v. *Lond. & North-West. Rail. Co.*, 32 Law J., Q. B. 113.

(*h*) *Broadbent* v. *Imp. Gas Co.*, 26 Law J., Ch. 281.

(*i*) *Lawrence* v. *Gt. Northern Rail Co.*, 16 Q. B. 643.

Assessment of damages to which the claimant is not legally entitled — Removal of the inquisition by certiorari.—If, upon an inquisition of damages resulting from the execution of works done under the authority of an act of parliament, the under-sheriff has directed the jury to assess and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a certiorari clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction; and the excess of jurisdiction may be shown upon affidavits, and need not appear upon the face of the proceedings. Thus, where it was shown by affidavit that the under-sheriff directed the jury that they might give compensation in respect of an alleged nuisance resulting from persons standing on a railway platform, which had been constructed under statutory authority near the plaintiff's dwelling-house, and thence overlooking the plaintiff's premises, it was held that the nuisance was not a legitimate subject of compensation; that the jury had exceeded their jurisdiction in giving compensation in respect of it, and as they had given one lump sum for the damage done, the court quashed the inquisition (*k*). Wherever, therefore, several items of claim are brought under the consideration of a sheriff's jury, and it is doubtful whether they are all legitimate subjects of compensation, the proper course is for the under-sheriff to direct the jury to find separately upon each item, to guard against the quashing of the whole inquisition.

Recovery of the amount of compensation assessed by a jury.—Although the verdict of the jury and the judgment are made records, they are not made records of any superior court, nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the amount (*l*).

Declaration in actions for railway compensations. — The plaintiff's declaration in an action for the amount of compensation assessed by a sheriff's jury under 8 Vict. c. 18, s. 68, usually sets forth the plaintiff's possession of a house or land, that it was injuriously affected by the execution of the works and the construction of the railway, and that the plaintiff was entitled to compensation; whereupon he gave notice to the railway company, stating the nature of his interest in the land, and the amount of compensation claimed by him pursuant to the statute in that behalf, that the plaintiff claimed to have the amount settled by a jury, that a jury was duly impannelled and sworn, and the parties having appeared and given evidence before them, the jury assessed the amount of compensation for the injury to the house at, &c., and for the injury to the

(*k*) *Re Penny*, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. *Reg.* v. *South Wales Rail. Co.*, 13 Q. B. 904. *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. 229.

(*l*) Coleridge, J., *Reg.* v. *Lond. & North-West. Rail. Co.*, 3 Ell. & Bl. 468.

plaintiff's business, at, &c., amounting in the whole to the sum of £——, and that the sheriff gave judgment for that sum to be paid to the plaintiff according to the provisions of the said statutes, and that the verdict and judgment were duly deposited with the clerk of the peace, by whom the same were kept among the records of the court of quarter sessions, yet the defendants had not paid to the plaintiff the said sum of £——, or any part thereof (*m*).

Pleadings — Defences — Traverse of the injury to the land.—The finding of the sheriff's jury on an inquisition under s. 68 of the Lands Clauses Consolidation Act (8 Vict. c. 18) is not conclusive; and, therefore, in an action brought on such an inquisition, it is competent to the defendant to traverse the allegation that the plaintiff's property was damaged or injuriously affected by the construction of the railway, or by the exercise of the powers vested in the company within the meaning of the act, and that the plaintiff was entitled to compensation under the provisions of the statute in respect of the same having been damaged or injuriously affected; or to plead these facts, and to prove that the subject-matters of the claim submitted to the determination of the sheriff's jury are not such as are contemplated by the 68th section (*n*).

If the sheriff's jury had any jurisdiction over the subject-matter of the inquiry, and power to award compensation to the plaintiff, the defendant cannot afterwards, in an action upon the judgment, set up as a defence that there was an excess of jurisdiction as to some part of the claim. In an action upon the judgment, it must be taken that there was jurisdiction, and the quantum of it cannot be investigated, for if that could be done the plaintiff would have to go down to trial prepared to prove each part of his claim, and such a course would be most inconvenient. Where, therefore, an action was brought upon a judgment following an inquisition found before the sheriff in a proceeding by the plaintiff to obtain compensation for an injury done to his premises by works carried on under the authority of an act of parliament, and the defendant sought to bar the action, and prevent the plaintiff from recovering, by proving that part of the damages was given in respect of an injury arising from the cutting off some water to which the plaintiff had no legal title, it was held that no such defence was open to the defendant in that action, and that if the sheriff's jury had improperly taken upon themselves to give damages in respect of the loss of the water, the matter should have been set right by certiorari, and the inquisition quashed (*o*).

(*m*) *Chapman* v. *Monm. Rail. &c. Co.*, 11 Exch. 267; 27 Law J., Exch. 97.

(*n*) *Chapman* v. *Monm. Rail. &c. Co.*, ut sup. *Reg.* v. *Lond. & North-West. Rail. Co.*, 3 Ell. & Bl. 468. *Read* v. *Vict. Statn. & Pim. Rail. Co.*, 32 Law J., Exch. 167.

(*o*) *Mortimer* v. *S. W. Rail. Co.*, 1 Ell. & Ell. 382; 28 Law J., Q. B. 129. *Corrigal* v. *Lond. & Bl. Rail. Co.*, 5 M. & Gr. 245.

Remedy for subsequent unforeseen damages.—In respect of all damages which can be foreseen and ascertained at the time of the inquiry, there can be no further compensation. The assessment must "be once for all; finally; for all time" (*p*); but if, after compensation has been obtained for the known calculable injury, damage has been sustained which could not have been foreseen, and this damage is the natural and necessary result of the construction of the works authorised by statute, the remedy appears to be by resort to the sheriff's jury, under s. 68 of the Lands Clauses Consolidation Act (*q*). Thus, if some violent storm has destroyed a portion of the earthworks of a railway, or if there has been a subsidence or fall of an embankment from purely accidental causes, and the accident and its reparation have caused injury to an adjoining landowner, the claim for compensation seems to fall within the compensatory clause of the statute. "The damage resulting from the reparation of a mischief of this sort," observes the Lord Chancellor, "appears to me to be damage strictly arising from the carrying on of the works, and as much within the Lands Clauses Consolidation Act as if it had occurred before the opening of the railway. I see no difference between the title to compensation of a person who has sustained loss by an unexpected land-slip, whether the accident happened before the line was opened, or two or three days, or two or three weeks, subsequently to that period" (*r*).

If, on the other hand, the subsequent injury results from negligence, or want of care and skill in the execution of the authorised works, or from the doing of some wrongful and unauthorised act, or for not doing what an act of parliament or a legal obligation requires to be done, the remedy is by action (*s*), for no compensation is given, as previously mentioned by s. 68 of the Lands Clauses Consolidation Act, or, generally speaking, by any compensation clauses in statutes authorising the commission of injurious acts, unless the injury is the natural and necessary result of the doing of the authorised act. If the act is a wrongful act notwithstanding the statute, the compensation clauses do not apply (*t*); and if the statutory remedy does not apply, an action for damage is, as we have seen, maintainable (*u*).

(*p*) *Croft* v. *Lond. & North-West. Rail. Co.*, 32 Law J., Q. B. 120.

(*q*) *Ware, in re*, 9 Exch. 402; 7 Rail. Cas. 780. *Glover* v. *North Staff. Rail. Co.*, 16 Q. B. 643. *Lond. & North-West. Rail. Co.* v. *Bradley*, 3 Mac. & G. 336.

(*r*) *Lanc. & York. Rail. Co.* v. *Evans*, 15 Beav. 332.

(*s*) *Lawrence* v. *Gt. Northern Rail. Co.*, 16 Q. B. 643. *Wilkes* v. *Hungerford Market Co.*, 2 Sc. 462, 463; 2 Bing. N. C. 281. *Bagnall* v. *Lond. & North-West. Rail. Co.*, 31 Law J., Exch. 121.

(*t*) *Broadbent* v. *Imp. Gas, &c. Co.*, 26 Law J., Ch. 280.

(*u*) Ante, p. 648. *Blagrave* v. *Waterworks, &c. Co.*, 1 Hurl. & Norm. 385.

SECTION III.

REMEDIES BY ACTION AND BY INJUNCTION IN RESPECT OF INJURIES FROM THE NEGLIGENT DOING OF THINGS AUTHORISED TO BE DONE BY STATUTE.

Limitation of actions and notice of action in respect of things done under statutory authority.—Acts of parliament authorising particular things to be done by private individuals, generally contain a clause for the protection of persons acting in the execution of the act, whereby it is enacted that all actions to be commenced against any person for anything done in pursuance of the act shall be laid and tried in the county where the fact was committed, and shall be commenced within a certain limited period after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and that no plaintiff shall recover damages in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall be paid into court by or on behalf of the defendant after action brought (ante, pp. 497–503).

Limitation of actions in respect of things done under local and personal statutes.—By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for anything done under the authority or in pursuance of any local and personal acts (*x*), shall be two years, or in case of continuing damage, then the action must be brought within one year after such damage shall have ceased, and so much of any enactment as appoints any other period of limitation is repealed.

When it is said that a man does a thing in pursuance of an act of parliament, it is not meant, as we have seen, that he does it in strict accordance with the provisions of the statute, nor is it necessary to prove that he knew of the existence of the act, or that he was intending to act in execution of it at the time he did the thing complained of, for a man may be acting pursuant to a statute without knowing it (*y*).

Accrual of the cause of action and commencement of the period of limitation.—Where the defendant, who was a surveyor of highways, dug into the plaintiff's soil, threw down fences, and erected a wall, and the Highway Act (13 Geo. 3, c. 78, s. 81) required the action to be brought "within three months after the fact committed, and not afterwards;" and no action was brought within the three months, and after that period expired the surveyor raised the wall and finished it; it was held that the raising of the wall was not a fresh fact committed within the meaning of the statute, and would not extend the period of limitation beyond the

(*x*) *Cock* v. *Gent*, 13 Law J., Ex. 24.
(*y*) *Read* v. *Coker*, 22 Law J., C. P. 201; ante, p. 500.

three months (*z*). But when the cause of injury was a digging in the soil of a street, and the excavation at first produced no injury to the plaintiff, but some months after it had been made it weakened the foundations of the wall of the plaintiff's house, and caused it to fall, it was held that the falling of the wall of the house constituted the cause of action; that no action was maintainable for the digging in the street until injury to the plaintiff resulted therefrom, and, therefore, that the time of limitation ran from the falling of the wall, and not from the time of the making the excavation (*a*). A continuing excavation of this sort has been said to be a continuing nuisance, constituting a continuing cause of action so long as it is permitted to exist (*b*); and so is a continuing obstruction to a watercourse and flow of water (*c*).

Of notice of action.—The words in clauses of acts of parliament requiring notice of action to be given "in respect of anything done in pursuance of the act, or in execution of the powers thereof, apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes" (*d*). Those words do not mean acts done in strict pursuance of the act, because in such a case a party would be acting legally, and would not require protection. They mean, that a party, to be entitled to the protection, must *bonâ fide* and really believe himself to be authorised by the act (*e*). Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties imposed upon him, yet if he acts *bonâ fide*, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is entitled to the protection conferred upon persons so acting (*f*). Whenever, indeed, any action is brought against any one for anything done by the order, direction, or authority of a person authorised to act in the matter, under the provisions of a public or a private act of parliament, it will generally be found necessary to give notice of action. It must be given in cases of nonfeazance, where the party having undertaken to act in pursuance of some statute has failed to do what he ought to have done; as in cases of misfeazance, where he has acted negligently or wrongfully in the execution of the act (*g*). The notice must state positively that an action will be brought, and must in general state the cause of action (*h*).

(*z*) *Wordsworth* v. *Harley*, 1 B. & Ad. 391.

(*a*) *Roberts* v. *Read*, 16 East, 217. *Bonomi* v. *Backhouse*, ante, pp. 47, 518.

(*b*) Holroyd, J., *Howell* v. *Young*, 5 B. & C. 268. *Gillon* v. *Boddington*, 4 R. & M. 164.

(*c*) *Whitehouse* v. *Fellowes*, 30 Law J., C. P. 305.

(*d*) *Oakley* v. *Kensington Can. Co.*, 5 B. & Ad. 139. *Beechy* v. *Sides*, 9 B. & C. 809.

(*e*) *Hughes* v. *Buckland*, 15 M. & W. 353. *Gaby* v. *Wilts. Canal Co.*, 3 M. & S. 580; ante, p. 501.

(*f*) *Smith* v. *Wiltshire*, 2 B. & B. 620. *Smith* v. *Shaw*, 10 B. & C. 284.

(*g*) *Joule* v. *Taylor*, 7 Exch. 58; ante, pp. 499–503.

(*h*) *Mason* v. *Birkenhead Com. &c.*, 6 H. & N. 72; 29 Law J., Exch. 406.

Notice of action is required only where the action is brought for a tort or a quasi tort, and not for a breach of a specific contract (*i*).

Notice of action to gas companies and trading corporations and their officers.—The right to notice of action has been extended by numerous acts of parliament to all sorts of trading corporations, joint-stock companies, and associations called into existence by statute for a variety of local and private purposes, and purposes of gain, so that whenever an action of tort is brought against a company or association which is incorporated or regulated by statute, or derives its powers from some special act of parliament, or against the officers of any such company or association, it will, in general, be necessary to give notice of action. This will be found to be the case in actions against many of the gas companies or their officers for things done by them under the powers or in pursuance of their several acts of incorporation, also against certain railway companies (*k*) when there has been an omission of some duty imposed upon the company by the act, such as the non-repair of fences, or the charging or levying excessive tolls under the powers of their act of incorporation (*l*); but when the action is brought against them for a breach of their duty as common carriers, no notice of action is requisite (*m*).

Neither the Lands Clauses Act nor the Companies Clauses Consolidation Act contain any section requiring notice of action to be given to companies in respect of things done by them under the authority of those statutes; but s. 141 of the Companies Clauses Act (8 Vict. c. 16), and s. 135 of the Lands Clauses Consolidation Act (8 Vict. c. 18), entitle the company to a verdict, if before action they tender sufficient amends.

Notice of action to toll and tax-collectors and revenue-officers.—Notice of action also is required to be given in respect of things done by toll-collectors on turnpike-roads acting in pursuance of the General Turnpike Act, or certain special acts of parliament authorising the collection of toll (*n*), or by revenue-officers (*o*), tax-collectors (*p*), or commissioners and other persons acting in the execution of the several acts relating to the land-tax (*q*). If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action (*r*). If a toll or tax, though not legally payable, is demanded *bonâ fide* by a collector, who intends to act right, and has fair and reasonable grounds for believing that he has a right to demand the

(*i*) Wightman, J., *Davis* v. *Curling*, 8 Q. B. 293. *Fletcher* v. *Greenwell*, 4 Dowl. P. C. 166. *Davis* v. *Mayor, &c. of Swansea*, 22 Law J., Exch. 297.

(*k*) *Carpue* v. *Lond. & Bright. Rail. Co.*, 5 Q. B. 747.

(*l*) *Kent* v. *Gt. Western Rail. Co.*, 3 C. B. 725.

(*m*) *Palmer* v. *Grand. Junc. Rail. Co.*, 4 M. & W. 766. *Garton* v. *Gt. West. Rail. Co.*, 7 W. R., Ex. 478; 33 Law T. R. 240.

(*n*) *Waterhouse* v. *Keen*, 4 B. & C. 200.

(*o*) *Greenway* v. *Hurd*, 4 T. R. 553.

(*p*) 43 Geo. 3, c. 99, s. 70.

(*q*) 5 & 6 Wm. 4, c. 20, s. 19. *Thomas* v. *Williams*, 13 Law J., Exch. 87.

(*r*) *Daniel* v. *Wilson*, 5 T. R. 1.

money, the collector is entitled to the statutory protection, and must have notice of action (*s*). But if a revenue-officer, toll or tax-collector, improperly, and without colour of right, extorts money by virtue of his office, and in plain and manifest abuse of the statute under which he acts, he will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection (*t*). If he makes a wholly unauthorised charge, and is guilty of manifest extortion under a threat of legal proceedings, or the pressure of a distress (*u*), he cannot shelter himself under the provisions of the statute.

Notice of action against officers of local boards of health.—A contractor who contracts with a local board of health for the digging of drains and wells and making excavations, is a person acting under the direction of the board within 11 & 12 Vict. c. 63, s. 139, and is entitled to notice of action for digging a hole in a public thoroughfare, and leaving it unguarded and without a light, although the board might not be liable for the contractor's act (*x*).

Notice of action against surveyors and persons acting in execution of the highway acts.—The Highway Act, 5 & 6 Wm. 4, c. 50, s. 109, requires notice of action to be given for anything done in pursuance of the act. Where, therefore, a surveyor of highways left an obstruction of gravel and sand in a highway, and had notice to remove it, and failed so to do, it was held that he was entitled to notice of action (*y*). And where a highway board, with their surveyor, trespassed upon private grounds, and broke down a private gate in the assertion of a supposed right of way which had no existence, it was held that they were entitled to notice of action. "The defendants," observes Lord Denman, "might believe that they were acting in execution of the power to remove obstructions in public roads without coming to a very irrational conclusion. The argument against it is, indeed, founded on a specific clause, which prescribes a different course of proceeding to this end, but we are not prepared to hold that officers of this description are bound to argue on a comparison of clauses in a long act, and to decide correctly" (*z*). Wherever, therefore, a surveyor is acting *bonâ fide* in his public capacity as surveyor, he is entitled to notice of action (*a*).

A person acting as surveyor under an appointment in fact, though informal and illegal, is, nevertheless, entitled to notice of action if he was

(*s*) *Waterhouse* v. *Keen*, 4 B. & C. 211.
(*t*) *Irving* v. *Wilson*, 4 T. R. 486.
(*u*) *Umphelby* v. *M'Lean*, 1 B. & Ald. 42.
(*x*) *Newton* v. *Ellis*, 5 Ell. & Bl. 115; 24 Law J., Q. B. 337.
(*y*) *Davis* v. *Curling*, 8 Q. B. 292.
(*z*) *Smith* v. *Hopper*, 9 Q. B. 1014.
(*a*) *Hardwick* v. *Moss*, 31 Law J., Exch. 207.

acting in what he did in the *bonâ-fide* belief that he had been properly appointed (*b*).

Tender of amends before action.—The statutes requiring notice of action to be given further provide, as we have seen, that the action shall not be maintainable, and that the jury shall give a verdict for the defendant, if there has been a tender of sufficient amends before action (ante, pp. 503, 638). This is the case with the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 135); the Railway Clauses Act (8 & 9 Vict. c. 20, s. 139); the Waterworks Clauses Act (10 & 11 Vict. c. 17, s. 84); the Harbours, Docks, and Piers Clauses Act (10 & 11 Vict. c. 27, s. 91); the Towns Improvement Clauses Act (10 & 11 Vict. c. 34, s. 209); the Commissioners Clauses Act (10 & 11 Vict. c. 16, s. 103); the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14, s. 51); the Town Police Clauses Act (10 & 11 Vict. c. 89, s. 72), and the Cemeteries Clauses Act (10 & 11 Vict. c. 65, s. 61).

Parties to be made defendants.—All parties who have been guilty of negligence or misconduct in the execution of public works under the authority of an act of parliament, or have exceeded the powers intrusted to them (*c*), or who have neglected a public duty imposed upon them by statute, or by the common law (*d*), are, as we have seen, liable to be sued by the party injured (ante, pp. 648–657); but if the injury of which the plaintiff complains is the inevitable result of the execution of the authorised act, the liability will be regulated and governed by the statute. Where an action was brought against a municipal corporation for an injury to the plaintiff's eye, by reason of the negligence of a servant of the corporation, who had been employed by them to chip a gas-pipe, and the corporation pleaded that the injury was done in the execution of their Local Improvement Act, and without any neglect or mismanagement of the defendants otherwise than by their workman, and that the workman employed by them was well skilled and qualified, it was held that the plea was no answer to the action (*e*).

Section 138 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), provides that the local board of health of any non-corporate district may be sued in the name of the clerk for the time being concerning any matter or thing whatsoever relating to any matter done by them under the provisions of the act, and that the clerk shall be reimbursed out of the general district rate all costs and damages. By s. 144 full compensation is to be made out of the general or special district rates to all persons sustaining damage by reason of the exercise of any of the powers of the act, which damage may be settled by arbitration in case of dispute, or be

(*b*) *Hughes* v. *Buckland*, 15 M. & W. 355.

(*c*) *Reg.* v. *Knight*, 8 W. R. 293.

(*d*) *Bayley* v. *Wolverhampton Waterworks Co.*, 30 Law J., Exch. 57.

(*e*) *Scott* v. *Mayor, &c. of Manchester*, 1 H. & N. 59; 2 H. & N. 204.

recovered in a summary way before justices if the sum claimed does not exceed 20*l*. And by s. 140 it is enacted, that no matter or thing done by any member of the local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the local board, shall, if the matter or thing were done *bonâ fide* for the purpose of executing the act, subject them, or any of them, personally to any action, liability, claim, or demand whatsoever, and that any expense incurred by such local board, member, officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of the act.

Where public health acts, or local acts for the improvement of towns, and the authorisation of public works to be effected through the medium of trustees or commissioners, or a board, enact that the trustees or the commissioners, or the board, shall and may be sued in the name of their clerk, it is generally meant that they must so sue and be sued; so that an action for a wrong done in the execution of the act cannot be brought against individual commissioners or trustees, or individual members of the board. In some cases these statutes require the action to be brought against the clerk (*f*); in others they require the action to be brought against the board in its statutory name, as a quasi-corporate body (*g*). If it is sued in a wrong corporate name, the misnomer must be pleaded in abatement.

Contractors and workmen executing public works under the direction, and by the orders, of a local board acting in the exercise of statutory powers, are responsible in damages to parties who have been injured by reason of the negligent execution of the works intrusted to them to execute, although the statute enacts that parties shall not be personally liable for anything done by them in the *bonâ-fide* execution of the statute (*h*).

Pleadings—Plea of Not guilty.—The statute 5 & 6 Vict. c. 97, s. 3, repeals so much of any clause or provision in any public local and personal act, or local and personal act, or in any act of a local and personal nature, as enables any party to plead the general issue only, and to give any special matter in evidence. The plea of Not guilty by statute, therefore, is not available for railway companies, gas companies, trading corporations, local commissioners, or their subordinates, or any persons acting in the execution of local acts for the improvement, lighting, and paving of towns, unless there is some special enactment in that behalf overriding the provisions of the last-named statute. Whenever, therefore, the defence of

(*f*) *Allen* v. *Hayward*, 7 Q. B. 973. *Ruck* v. *Williams*, 3 H. & N. 308.

(*g*) *Southampt. &c. Bridge Co.* v. *Local Board of Southampt.* 8 Ell. & Bl. 814; ante, pp. 653, 654.

(*h*) *Arthy* v. *Coleman*, ante, p. 654.

the want of notice of action is founded on the provisions of a local and personal act, it must be specially pleaded, and cannot be given in evidence under the plea of Not guilty by statute (*i*). Thus, a railway company, whose local and personal act requires notice of action to be given to the company, must plead the want of such notice specially (*k*); and persons who claim to have acted under local acts for paving, lighting, watching, or cleansing towns (*l*), or any of the local and personal acts requiring notice of action to be given, must plead specially the want of such notice. If upon the face of the declaration of the cause of action there is nothing to show that the action is brought in respect of something done, or omitted to be done, in pursuance of the statute, the plea must contain an averment to that effect, and show on the record that the action is brought for some matter or cause of action in respect of which notice of action ought to have been given. If it fails to do this, and the matter does not appear upon the record, the plea will be bad after verdict (*m*).

Pleas of tender of amends before action.—It is not necessary for a party who pleads a tender of amends before action to pay the money into court, as the tender is not a tender of any debt, but is a matter collateral to the defence. If the plaintiff chooses to renounce the tender, and prefers the chance of what he may gain by verdict, he has no claim to the amount tendered, and if the verdict goes against him he gets nothing (*n*).

Payment of money into court after action.—The statutes for the protection of persons who have made a mistake in the exercise of a statutable authority, honestly believing that they were justified by it, further enable such persons, as we have seen, if they have neglected to tender amends before action, to offer compensation for the wrong they have unintentionally committed by the payment of money into court, and they enact that the defendant is to be entitled to a verdict if he has paid into court a sum which a jury may think an adequate compensation for the wrong suffered (ante, p. 503).

Pleas of justification under the authority of an act of parliament.—When the defence relied upon is that the act complained of was done under the authority of an act of parliament, the defendant must justify under the act, unless the matter of justification is authorised to be given in evidence under a plea of Not guilty. When the defendant justifies under the statute, he may plead generally that the several acts, matters, and things of which the plaintiff complains, were lawfully done by the defendant in exercise, and by virtue of the powers and authorities given for that

(*i*) *Davey* v. *Warne*, 14 M. & W. 208.
(*k*) *Edwards* v. *Gt. Western Rail. Co.*, 11 C. B. 650.
(*l*) *Law* v. *Dodd*, 17 Law J., M. C. 65.
(*m*) *Garton* v. *Gt. West. Rail. Co.*, 7 W. R., Ex. C. 478; 33 Law T. R. 240.
(*n*) *Jones* v. *Gooday*, 9 M. & W. 744.

purpose to the defendant by an act of parliament made, &c., intituled, &c. (*o*).

Evidence at the trial—Proof of notice of action.—When the statute requiring notice of action to be given specially directs that no evidence shall be given of anything not included in the notice, the plaintiff must prove the giving of notice, in order to lay a foundation for the other evidence (*p*).

Where an act of parliament imposed upon a waterworks company the duty of repairing, renewing, and keeping certain fire-plugs in proper order, it was held that it was no answer to an action for damages resulting from a breach of this duty, to show that the fire-plugs were the property of another public body which was required to pay the costs and charges of keeping them in repair (*q*).

Power of the Court of Chancery to grant an injunction to prevent unnecessary injury from the execution of statutory powers.—The statutory right to compensation given by act of parliament to persons sustaining injury from the exercise of statutory powers, does not abrogate the regulating and restraining jurisdiction of the Court of Chancery, for nothing would be more pernicious than to leave the large and ample powers so frequently conferred by act of parliament free from all control. Persons, therefore, having such powers will be restrained from exercising them so as to inflict avoidable and unnecessary injury upon others. Thus, where a railway company, in the exercise of its statutory powers, commenced the building of a bridge across a mill-race in such a way as to diminish the full force of the current and lessen the working power of the mill, the Lord Chancellor by injunction prevented the erection of any bridge over the stream with arches of less dimensions than those recommended in the report of a particular engineer (*r*). Here it was shown that the bridge was altogether wrongly constructed, and the work negligently and unskilfully done; but where there is no proof of negligence, and the accruing injury arises naturally and necessarily from the doing of what is authorised to be done, the court cannot interfere, but must remit the injured party to the statutory compensation for the damage, where that is provided (*s*).

The court will by injunction restrain public boards and commissioners from doing acts in excess of the statutory powers intrusted in them, and

(*o*) *Beaver* v. *Mayor of Manchester*, 8 Ell. & Bl. 44; 26 Law J., Q. B. 311. *Watkins* v. *Gt. Northern Rail. Co.*, 16 Q. B. 961. As to the replication to this plea, see *Brine* v. *Gt. West. Rail. Co.*, 31 Law J., Q. B. 101.

(*p*) *Johnson* v. *Lord*, 1 M. & M. 444; and see ante, pp. 641–644; post, ch. 21.

(*q*) *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241.

(*r*) *Coats* v. *Clarence Rail. Co.*, 1 Russ. & M. 181.

(*s*) *Stainton* v. *Metrop. Board, &c.*, 23 Beav. 232; 26 Law J., Ch. 300. *Biddulph* v. *St. George's Vestry*, 2 N. R. 212; Ch. 11 W. R. 524; ib. 44.

from carrying out what they may be pleased to call the spirit of the act in an arbitrary manner (*t*).

Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers.—Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural watercourses, the power must be exercised so as not to create a nuisance or interfere with the private rights of individuals (ante, pp. 133–161). If a riparian proprietor has a right to enjoy a river so far unpolluted that fish can live in it, and cattle drink of it, and the town council of a neighbouring borough, professing to act under statutory powers, pour their house-drainage and the filth from water-closets into the river in such quantities that the water becomes corrupt and stinks, and fish will no longer live in it, nor cattle drink it, the court will grant an injunction to prevent the continued defilement of the stream, and to relieve the riparian proprietor from the necessity of bringing a series of actions for the daily annoyance (*u*).

In deciding on the right of a single proprietor to an injunction, the court cannot take into consideration the circumstance that a vast population will suffer by reason of its interference. "There are cases at law," observes Sir W. P. Wood, V. C., "in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected, the question simply is, whether he has those rights, and not whether a large population will be inconvenienced by measures taken for their protection (*x*).

Injunction to prevent misuse by companies and public bodies of land acquired by them under statutory authority.—Acts of parliament compelling landowners to part with portions of their property for purposes considered beneficial to the public, are regarded as contracts made by the legislature on behalf of all persons interested under them, and the purposes for which the land is taken are of the essence of the contract, so that the landowner has a right to confine the use of the land to the specified purpose, and may obtain an injunction to restrain the company from devoting it to another and a different purpose (*y*).

If any public body authorised to enter land and construct works in the execution of statutory powers, exceed the authority conferred upon them, and do acts *ultra vires*, the court will by injunction restrain their proceed-

(*t*) *Tinkler* v. *Wandsworth Board of Works*, 1 Giff. 417; 2 De G. & J. 261.

(*u*) Wood, V. C., *Attorney-Gen.* v. *Borough of Birmingham*, 4 K. & J. 528. *Att.-Gen.* v. *Metrop. Board, &c.*, 2 N. R. Ch. 312; 9 L. T. R., N. S. 139.

(*x*) *Att.-Gen.* v. *Borough of Birmingham*, ut sup.

(*y*) *Bostock* v. *North Staff. Rail. Co.*, 3 Sm. & G. 291; 4 Ell. & Bl. 798.

ings and confine them within the limits of their jurisdiction (*z*), "otherwise the result may be, that after your property has been taken and destroyed, after your house has been pulled down and a railway substituted in its place, you may have the satisfaction of discovering that the railway company was wrong, and that a pecuniary compensation is the only satisfaction you can receive for the injury" (*a*).

And whenever public bodies acting in the exercise of statutory powers, have failed to comply with any condition imposed by statute for the protection of the public, the Court of Chancery will, as we have seen, by injunction prevent the exercise of the statutory authority until the condition precedent has been strictly fulfilled (*b*).

(*z*) *Tinkler* v. *Wandsworth District Board*, 2 De J. & G. 273.

(*a*) *Dun. Nav. Co.* v. *North Mid. Rail. Co.* 1 Rail. C. 154.

(*b*) *Gibson* v. *Hammersmith Rail. Co.*, ante, p. 658.

CHAPTER XVII.

OF LIBEL AND SLANDER.

SECTION I.—*Of libel or written slander.*—Distinction between slander by word of mouth and slander in a published writing—Oral slander rendered actionable by being printed and published—Exemption of the author and liability of the publisher—What writings are libellous and actionable—Evidence of malice—Privileged writings and communications—Defamatory writings in courts of justice—Defamatory petitions to the Queen, to parliament, or to ministers or officers of state—Criminatory communications made in discharge of a public or private duty—Criminatory pastoral letters—Defamatory letters respecting clergymen—Privileged communications between relations and friends—Privileged communications by parties specially interested in the subject-matter of the communication—Reckless and inconsiderate communications—Disclosures made at the plaintiff's request—Communications between subscribers to a charity—Privileged communications respecting the character of servants—Comments in excess of the privilege—Effect of addressing privileged communications to the wrong party—Reports in newspapers of trials and proceedings preliminary thereto—Reports of speeches in parliament, at vestries, and at public meetings—Reviews and criticisms in public papers—Comments upon the public character of public men—Disparaging criticisms by one tradesman upon the goods of a rival tradesman.

SECTION II.—*Of oral slander.*—Defamatory words not actionable without proof of special damage—Defamatory words actionable per se—In what cases actionable words are rendered not actionable by precedent or subsequent words—Defamatory words concerning tradesmen and professional men—Words imputing official misconduct—Words rendered actionable by reason of special damage—Slanderous denunciations from the pulpit causing loss of situation or employment—Effect of the dismissal being a wrongful dismissal—Unauthorised repetition of verbal slander—Privileged communications by word of mouth—Privileged charges and accusations of felony—Privileged statements before magistrates and judicial tribunals—Privileged comments by magistrates and judges—Of the interpretation and application of slanderous words—Slander of title.

SECTION III.—*Of actions and indictments for libel and slander.*—Consolidation of actions—Parties, pleadings, defences, and evidence—Damages recoverable—Indictment for libel.

SECTION I.

OF LIBEL AND WRITTEN SLANDER.

Of the distinction between slander by word of mouth and slander in a published writing.—Slander in writing or in print has always been considered

in our law a graver and more serious wrong and injury than slander by mere word of mouth, inasmuch as it is accompanied with greater coolness and deliberation, indicates greater malice, and is in general propagated wider and further than oral slander. Hence words of a depreciatory character, which, if spoken only, would not be actionable, may become so by being put into writing or print and published. "There is a very material distinction," observes Gould, J., "between libels and words. A libel is punishable both criminally and by action, when mere speaking the words would not be punishable in either way." For speaking the words "rogue" and "rascal" of any one, an action will not lie; but if these words were written and published of any one, an action would lie (*c*). Merely to call a man a swindler, or a cheat, or dishonest person by word of mouth, is not actionable (*d*), unless it be spoken of him in his trade or business, so as to have damaged him with his customers (*e*); but if such words are published in writing or printing, they are actionable *per se* (*f*). Verbal reflections upon the chastity of a young lady are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable (*g*).

Before, therefore, a person gives to oral calumny general notoriety, by circulating it in print, he must be prepared to prove its truth to the letter; for he has no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. "Indeed," observes Best, C. J., "if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter" (*h*).

Oral slander rendered actionable by being printed and published—Exemption of the author and liability of the publisher.—Oral slander uttered under circumstances not rendering it actionable, may, therefore, become actionable by being printed and published, and the publisher may become responsible in damages for publishing and circulating in writing what would not be actionable so long as it was circulated only by word of mouth. In cases of this sort, the author who has spoken the words is exempt from all legal responsibility, while the man who prints them and circulates them in writing, and all who aid and assist therein, are liable to an action for damages (*i*).

The injury to character resulting from the publication of slanderous

(*c*) *Villers* v. *Mousley*, 2 Wils. 403; 5 Co. 125 b.
(*d*) *Savile* v. *Jardine*, 2 H. Bl. 532.
(*e*) Bac. Abr. SLANDER, B.
(*f*) *Janson* v. *Stuart*, 1 T. R. 748.
(*g*) Christian's Bl. Com. 125, n. 6.
(*h*) *De Crespigny* v. *Wellesley*, 5 Bing. 406.
(*i*) *M'Gregor* v. *Thwaites*, 3 B. & C. 35. *Thorley* v. *Ld. Kerry*, 4 Taunt. 354.

writings is considered to be of far greater consequence than that arising from the repetition of oral slander. "In the latter case, what has been said is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, completely to remove." As to the question of the publisher of a libel being allowed to exonerate himself from the responsibility of the act by naming the author, "Of what use is it," observes Best, J., "to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic" (*k*).

It is no defence, therefore, to an action for a libel, to show that a ludicrous narrative in a newspaper concerning the plaintiff was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper" (*l*).

What writings are libellous and actionable.—All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest conduct (*m*), or which are injurious to the private character or credit or another, or tend to render a man ridiculous or contemptible in the relations of private life, are libellous, and an action for damages is maintainable against the writer and publisher unless the publication ranges within that class of communications which are termed privileged communications, presently mentioned, or unless the libeller can prove the truth of the libel. To impute to a landlord that, in putting in a distress, he was colluding with an insolvent tenant, is libellous (*n*). It is a libel, also, to describe a man in writing as an "infernal villain" (*o*), or an "itchy old toad" (*p*), or as being in insolvent circumstances and unable to pay his debts (*q*), or

(*k*) *De Crespigny* v. *Wellesley*, 5 Bing. 403.

(*l*) *Cook* v. *Ward*, 6 Bing. 415.

(*m*) *Digby* v. *Thompson*, 4 B. & Ad. 821.

(*n*) *Haire* v. *Wilson*, 9 B. & C. 645.

(*o*) *Bell* v. *Stone*, 1 B. & P. 331.

(*p*) Gould, J., *Villers* v. *Mousley*, 2 Wils. 403.

(*p*) *Metrop. Saloon Om. Co.* v. *Hawkins*, 4 H. & N. 146; 28 Law J., Exch. 201.

as being a mere man of straw (*r*), unfit to be trusted with money (*s*), or as being guilty of ingratitude to his friends and benefactors, or of misconduct in an office of trust, or of general misconduct, corruption, or neglect of duty in the management of business that has been intrusted to him to execute.

Every publication in writing, imputing insanity to the plaintiff (*t*), or holding him up to public hatred, contempt, or ridicule, or having a tendency to make him feared, or his society shunned and avoided, is a libel. To publish in writing, therefore, of a man that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most barefaced manner, is a libel (*u*). It is a libel, also, to publish of a person soliciting relief from a charitable society, that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secretary (*x*); or to impute in writing to the captain of a ship that his ship is unseaworthy, as the imputation reflects upon the personal character and professional conduct of the captain. "It is like saying of an innkeeper or tea-dealer, that his wine or his tea is poisoned" (*y*). To impute to a physician of character and eminence that he is concerned in vending quack medicines is also libellous; and, therefore, if a vendor of pills falsely advertises his pills as being prepared and furnished by a physician in practice, without the authority of the latter, he is guilty of a libel upon the physician (*z*). But merely to write of a person that he has done something in bad taste or manner, or that he has kept company unworthy of his position in society, or of his position in his profession, is not actionable (*a*).

To publish falsely in placards or newspapers, or through the medium of letters or writings, of a publican, that his license has been refused (*b*), or of a tradesman, that he knowingly sells bad articles, or of a gunsmith, or manufacturer, that he is a bad workman and unable to turn out a good gun or other article, is actionable; but mere puffs between rival tradesmen, the one depreciating the other's wares and exalting his own above them, are defensible (*c*). It is a libel, also, to say in writing, of the publisher of a newspaper that he is a "libellous journalist," for the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. To show, therefore, that the plaintiff has been guilty, on one occasion only, of publishing a libel, is not enough to justify the use of

(*r*) *Eaton* v. *Johns*, 1 Dowl. N. S. 612.
(*s*) *Cheese* v. *Scales*, 10 M. & W. 488.
(*t*) *Morgan* v. *Lingen*, 8 L. T. R., N. S. 800.
(*u*) *Clement* v. *Chivis*, 9 B. & C. 176.
(*x*) *Hoare* v. *Silverlock*, 12 Q. B. 624.
(*y*) *Ingram* v. *Lawson*, 8 Sc. 478.
(*z*) *Clark* v. *Freeman*, 11 Beav. 117.
(*a*) *Clay* v. *Roberts*, 11 W. R. 649; 9 Jur. N. S. 580.
(*b*) *Bignell* v. *Buzzard*, 3 H. & N. 217; 27 Law J., Exch. 355.
(*c*) *Harman* v. *Delany*, 2 Str. 898. *Evans* v. *Harlow*, 5 Q. B. 624.

the term "libellous journalist," but the evidence would go in mitigation of damages (*d*).

Where a man complains of a libel, written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaint; but fraud ultra that transaction is not, on that account, to be imputed to him with impunity (*e*). If, therefore, a man is charged in writing with having cheated at dice, he is entitled to recover damages for the libel, although gambling and playing at dice are illegal (*f*).

Of the evidence of malice.—Malice is said to be the gist of an action for defamation or slander, but the word is not used in the popular sense, but in the sense the law puts upon the expression. In every case of ordinary libel, not being a privileged communication, the law implies malice from the very fact of the publication of the defamatory matter. "Malice in common acceptation," observes Bayley, J., "means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, or if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, there shall be a remedy against me for the injury it produces. And the law recognises the distinction between these two descriptions of malice,—malice in fact, and malice in law, in actions of slander" (*g*).

Where, therefore, the circumstances under which the communication was made do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some duty, or for the purpose of endeavouring to enforce a right, the communication is deemed in law to be malicious; and the circumstance of the jury having negatived actual malice in such cases does not get rid of the effect of legal malice, and does not render the communication justifiable (*h*).

Privileged writings and communications.—When a communication is fairly made by one person to another in the discharge of some public or

(*d*) *Wakley* v. *Cooke*, 4 Exch. 518.
(*e*) Best, C. J., *Yrisarri* v. *Clement*, 3 Bing. 441.
(*f*) *Greville* v. *Chapman*, 5 Q. B. 744.
(*g*) *Bromage* v. *Prosser*, 4 B. & C. 255.
(*h*) Maule, J., *Wenman* v. *Ash*, 13 C. B. 845.

private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned, "the occasion," observes Parke, B., "prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits" (*i*). "The rule," observes Lord Campbell, "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant; otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice" (*k*).

Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the court has assumed the jurisdiction of determining. But if there is any dispute about those circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege if he believes the charge imputed untrue, unless he at the same time declares his belief of its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds.

Defamatory writings in courts of justice. — An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory bills or proceedings filed in chancery or in the ecclesiastical courts, or affidavits containing false and scandalous assertions against others (*l*). Therefore, if a man goes before justices of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles, for the party preferring them

(*i*) *Toogood* v. *Spyring*, 1 C. M. & R. 193. *Somerville* v. *Hawkins*, 10 C. B. 583. *Croft* v. *Stevens*, 7 H. & N. 570; 31 Law J., Exch. 143.

(*k*) *Taylor* v. *Hawkins*, 16 Q. B. 321.

(*l*) *Ram* v. *Lamley*, Hutt. 113. *Weston* v. *Dobniet*, Cro. Jac. 432. *Astley* v. *Younge*, 2 Burr. 809.

"has pursued the ordinary course of justice in such a case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation" (*m*). There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable (*n*); but the libeller may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted.

Where the cause of action against a defendant was, that he falsely and maliciously, and without any reasonable or probable cause, went before a Commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the defendant, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action (*o*). But if the court has no jurisdiction in the matter, and no right to entertain the proceeding, and the charge is recklessly and maliciously made, it will not be regarded as a privileged communication (*p*).

Defamatory petitions to the Queen, the parliament, or ministers or officers of state, respecting the conduct of magistrates and officers.—As all persons have an *interest* in the pure administration of public justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try by all means in their power to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared *bonâ fide*, and forwarded to the proper authorities, complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications; but if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without inquiry, when inquiry would have made the truth apparent, and would have shown the allegation of misconduct false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged (*q*). Petitions to the

(*m*) *Cutler* v. *Dixon*, 4 Co. 14 b.

(*n*) *Henderson* v. *Broomhead*, 4 H. & N. 579; 28 Law J., Ex. 360; 7 W. R. 492; 33 Law T. R. 312.

(*o*) *Revis* v. *Smith*, 18 C. B. 126; 25 Law J., C. P. 195.

(*p*) *Buckley* v. *Wood*, 4 Co. 14 b. *Lewis* v. *Levy*, Ell. Bl. & Ell. 554; 27 Law J., Q. B. 282.

(*q*) *Harrison* v. *Bush*, 5 Ell. & Bl. 354; 25 Law J., Q. B. 25. *Sturt* v. *Blagg*, 10 Q. B. 906.

king upon matters respecting which the crown cannot directly interfere, and petitions to parliament, although the petitioners, beside presenting them to the house, print them and distribute them amongst the members, fall within the same rule. All these are protected, that men may not be prevented by the dread of a prosecution or action from making communications which may be beneficial to the public (*r*).

Defamatory statements respecting the conduct of public officers, contained in an application for the redress of a grievance, or to expose some public abuse made *bonâ fide* to one of the king's ministers, who is supposed to have authority to afford redress, do not render the party making the application liable to an action. Thus, where the creditor of an officer in the army sent a petition to the secretary-at-war, inclosing bills of exchange accepted by the officer, and containing statements derogatory to the character of the officer as a man of honour, and concluded with a prayer that the officer might be ordered to discharge the debts due on the bills, it was held, that although neither the secretary-at-war nor the king had power to order the money to be paid, yet that if the jury thought that the petition contained only an honest statement of facts, according to the understanding of the party who sent it, and that it was addressed to the secretary-at-war *bonâ fide* for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff, they ought, under a plea of Not guilty, to find a verdict for the defendant (*s*). "Inasmuch as the defendant," observes Maule, J., "might, reasonably enough, conceive that the public officer to whom he addressed himself had power to assist him in obtaining payment of a just debt, the occasion justified the communication, however mistaken the defendant might be as to the extent of the jurisdiction of the person to whom he was addressing himself" (*t*). But if the secretary of state has no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application, the defendant is not exempt from responsibility (*u*).

Criminatory communications by public officers acting in discharge of a public duty.—A criminatory communication made by a clerk of the peace to the justices at quarter sessions is privileged, provided it is confined to a statement of facts pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace believes to be true; but if he imputes improper motives to others, and accuses them of attempts to extort money by misrepresentation; if irrelevant calumny is introduced into it, or it contains strictures upon the motives and conduct of others, which the facts stated do not

(*r*) *Lake* v. *King*, 1 Saund. 132.
(*s*) *Fairman* v. *Ives*, 5 B. & Ald. 644.
(*t*) *Wenman* v. *Ash*, 13 C. B. 845.
(*u*) *Blagg* v. *Sturt*, 10 Q. B. 905.

warrant, he will exceed his privilege, and subject himself to an action for damages (*x*).

Criminatory pastoral letters, and printed communications from clergymen to their parishioners. — There is nothing in the position of a rector of a parish, or a vicar, curate, or any other minister of religion, which entitles him to publish or circulate defamatory letters in his parish, and such letters, though written and published under the gravest sense of duty, or the sincerest desire to improve the morals of the community, are actionable, if they cast serious imputations on the character or conduct of private persons. Where the schoolmaster of a national school, established in a parish of which the defendant was rector, had been dismissed by the trustees of the school from his situation, and had then obtained possession of a dissenting chapel, and opened a school there, it was held that the rector had no right to circulate letters in the parish injuriously reflecting upon the conduct of the schoolmaster and the tendency of his teaching, under the pretext that he was watching over the souls of his parishioners, and exerting himself for their spiritual welfare. The parson in this case had, in a pastoral letter to divers parishioners, stigmatized the schoolmaster as not being a rightly-disposed Christian, as being imbued with a spirit of opposition to authority and the commands of Scripture, and designated his school as a schismatic school, upon which God's blessing could not rest; and he warned the rich against supporting it with subscriptions for money, and the poor against sending their children to it to be educated; and it was held that the libel was not privileged, and that there was evidence of malice for a jury. "What was there," observes Maule, J., "in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter, not only in his own, but in the adjoining parish, and so endeavour to prevent persons from subscribing and sending their children to the plaintiff's school? It is difficult to understand how the slightest right to do so can be suggested. As rector, he might, no doubt, visit and remonstrate with any of his flock; but when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine. We think that there was sufficient evidence for the jury to infer malice, and that in determining the question of malice, the particular nature of the libel itself cannot be excluded from the consideration of the jury. Indeed, it would be absurd for the judge to say to the jury, 'I will tell you what the libel was — you cannot look at it for the purpose of determining the

(*x*) *Cooke* v. *Wildes*, 5 Ell. & Bl. 340; 24 Law J., Q. B. 367. *Popham* v. *Pickburn*, 31 Law J., Exch. 133.

question of malice, but must consider the other facts given in evidence, without knowing anything whatever about the libel.' The absurdity of that shows that it cannot be law. In this case the terms of the letter itself are not without the character of malice. The endeavour to make the plaintiff's conduct a matter of spiritual delinquency; to represent it as something opposed not only to some worldly rule, but unchristian-like, and contrary to what would be done by a person who had faith in, and a willingness to obey, scriptural precepts, are matters on the face of the libel which make it proper that the jury, looking at the libel itself, should say whether or not there was actual malice" (*y*).

Defamatory letters respecting clergymen, addressed to the bishop of the diocese, will be privileged, if there was fair and reasonable cause for a resort to the bishop, but not if they were written on light and frivolous grounds. Where a parishioner wrote a letter to the bishop of the diocese informing him of reports current in the parish derogatory to the character of the clergyman, and throwing scandal upon the Church, and praying that an inquiry might be instituted, it was left to the jury to determine whether the letter was written with the malicious intention of slandering the plaintiff to the bishop, and giving currency to idle rumours, or with the honest intention of obtaining an inquiry (*z*). If the writer of the letter has means at hand for ascertaining whether the rumours are true or false, and neglects to avail himself of them, and chooses to remain in ignorance when he might have obtained full information, there would be no pretence for any claim of privilege.

Privileged confidential communications between relations respecting the character of a party proposing marriage.—Where the defendant, being the son-in-law of a widow lady, to whom the plaintiff was paying his addresses, wrote a letter to the lady charging the plaintiff with various acts of gross misconduct, and warned her against listening to his addresses, it was held that the communication was privileged. "If no explanation," observes Alderson, B., "had been given of the circumstances under which the letter was written, the law would, from the contents, infer it to have been published with a malicious motive against the plaintiff. But when it is shown that the parties were standing in circumstances of confidence and near relationship towards each other, I think the defendant's conduct justifiable, if he really believed in the truth of the statements which he made, though such statements were, in fact, erroneous, for it is for the common good of all that communications between parties situated as these were should be free and unrestrained. The whole question is, whether this is a *bonâ-fide* letter" (*a*).

(*y*) *Gilpin* v. *Fowler*, 9 Exch. 627; 23 Law J., Exch. 152.

(*z*) *James* v. *Boston*, 2 C. & K. 8.

(*a*) *Todd* v. *Hawkins*, 2 Mood. & Rob. 21.

Privileged confidential communications between friends to prevent an injury. —If a confidential communication is honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, the occasion justifies the act, and the communication is privileged (*b*). But no moral duty will justify the repetition and communication in writing of all the idle gossip a man hears to the prejudice of his neighbour. If a party is, under certain circumstances, under the pressure of a moral obligation to disclose the truth, he is, under all circumstances, under the pressure of a moral obligation to abstain from circulating and propagating falsehoods. No person, therefore, ought to hazard statements or assertions in writing injurious to the character of another, until he has by inquiry, where the means of inquiry exist, satisfied himself that they are founded in truth. The benefit to one man by the disclosure of the information, supposing it to be true, is counterbalanced by the injury done to another if it should turn out to be false.

Where the defendant had received a letter from his friend, the mate of a ship, containing a long narrative of dangers which the mate had incurred from the drunkenness of the captain, and asking for the defendant's advice, and the defendant, honestly believing in the truth of his friend's statement, handed the letter to the shipowner, who dismissed the captain, and the latter sued the defendant for damages, the court were equally divided in opinion as to whether the communication was privileged or not; Tindal, C. J., and Erle, J., being of opinion that the occasion and circumstances under which the communication took place, and the purity of motive of the defendant in making it, rendered it a privileged and protected communication, while Creswell, J., and Coltman, J., were of a contrary opinion. "It was not contended," observes Creswell, J., "that any legal duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned. The authority for the publication, if any, must therefore be derived from some moral duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any public duty to make the communication; neither his own situation, nor that of any of the parties concerned, nor the interests at stake, were such as affect the public weal. Was there any private duty? There was no relation of principal and agent between the shipowner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; and the duty, if it existed at all, as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the

(*b*) Holroyd, J., *Fairman* v. *Ives*, 5 B. & Ald. 645.

realm. But the same relation existed between the plaintiff and the defendant. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty, not to publish defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the shipowner that which he believed to be true" (*c*). Here, however, the defendant had no means of ascertaining the truth or falsehood of the information, and the responsibility of acting upon it, without due inquiry, ought to rest with the shipowner. And if the defendant had been possessed of any personal interest in the subject-matter to which the letter related; if he had been a part owner of the ship, or an underwriter on the ship, or had any property on board, the communication of the letter to the shipowner would have fallen clearly within the rule relating to excusable publications; and so, if the danger disclosed by the letter either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making, but would have been bound to make, the disclosure (*d*).

Privileged communications by parties having a pecuniary interest involved in the matter of the communication.—A communication made by a person immediately concerned in interest in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is a privileged communication, and protected from liability in an action for libel. Where a letter was written confidentially to certain bankers, conveying charges injurious to the professional character of a solicitor in the management of certain concerns which they had intrusted to him, and it appeared that the writer of the letter was himself interested in the affairs which he supposed to be mismanaged, and wrote the letter *bonâ fide* under the impression that his statements were well founded, it was held that the communication was privileged. "If a communication of this sort," observes Lord Ellenborough, "which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted" (*e*).

Among the various communications which have been held to be protected in consideration of the private interest of the party making them may be enumerated, notices of the commission of an act of bankruptcy by the plaintiff, given by a creditor whose pecuniary interests required the

(*c*) Cresswell, J., *Coxhead* v. *Richards*, 2 C. B. 605. *Bennett* v. *Deacon*, ib. 633. *Bell* v. *Parke*, 10 Ir. C. L. R. 284.

(*d*) Tindal, C. J., *Coxhead* v. *Richards*, 2 C. B. 596. *Wilson* v. *Robinson*, 7 Q. B. 68. Willes, J., *Amann* v. *Damm*, 8 C. B., N. S. 602.

(*e*) *M'Dougall* v. *Claridge*, 1 Campb. 266.

information to be given (*f*), and communications respecting the character of servants (post, p. 692).

Reckless and inconsiderate communications.—But it is not sufficient in every case of a confidential communication made by a party having an interest in the subject-matter thereof, to show that it was made *bonâ fide* and without malice. A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he himself honestly believes them to be true, and his belief is not an honest belief if it is formed in a reckless and inconsiderate manner. If he has the means by inquiry of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing opinions and statements unfavourable to another, ought to be prepared to show that he had some reasonable ground for it. There is a wide distinction between reckless assertions made by a man who assumes to have a knowledge of the facts he communicates, and honest communications made with a view to inquiry and information by a party interested in knowing the truth (*g*). If a question is asked concerning the character of another, the party interrogated is not justified in giving a damaging answer, unless he has some fair and reasonable foundation for it.

Disclosures made bonâ fide in the course of an investigation set on foot by the plaintiff himself are also privileged and protected. If, therefore, the plaintiff, or another party at the plaintiff's request, writes to the defendant asking for information on some point affecting the plaintiff's character, and the defendant merely relates what he has heard, the communication is privileged (*h*).

Communications between subscribers to charities.—Words spoken by one subscriber to a charity in answer to inquiries by another subscriber respecting the conduct of a medical man employed by the charity, in his attendance upon the objects of the charity, are not merely on account of those circumstances a privileged communication. "There may be a thousand subscribers to a charity," observes Lord Denman. "Such a claim of privilege is too large" (*i*).

Privileged communications respecting the character of servants.—One of the most ordinary and common instances of the application in practice of the privilege of protection to confidential communications of a criminatory character, is that of a former master giving the character of a discharged servant, which, if given with honesty of purpose to a party who has any interest in the inquiry, is a privileged communication, although made in the presence and hearing of a stranger (*k*). Even though the statement

(*f*) *Blackham* v. *Pugh*, 2 C. B. 611.
(*g*) *James* v. *Boston*, 2 Car. & K. 7.
(*h*) *Hopwood* v. *Thorn*, 8 C. B. 316.
(*i*) *Martin* v. *Strong*, 5 Ad. & E. 538.
(*k*) *Toogood* v. *Spyring*, 1 C. M. & R. 193.

be untrue in fact, the master will be held justified by the occasion in making the statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it, and if there is any evidence of wilful untruth in the statements as to character, there is evidence of malice to be submitted to a jury. "Generally speaking, anything said or written by a master when he gives the character of a servant is a privileged communication, if made *bonâ fide* in answer to inquiries that have been addressed to him. It is not essential that the party making the communication should be put into action in consequence of a third party's putting questions to him. He may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion to induce that other to seek information and put questions to him. The answers to such questions given *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant. When he volunteers to give the character, stronger evidence that he acted *bonâ fide* will be required than in the case where he has given the character after being required so to do (*l*).

If the employer has received credible information of the misconduct of a servant after the latter had left his situation, it is his duty to disclose the fact in answer to inquiries as to character, in order that a proper investigation may be made by parties interested in knowing the truth (*m*). If a good character is given to a servant, and then circumstances are discovered which show that the character was not deserved, it is the duty of the party who has given the good character to communicate the discovery to the person to whom such character has been given, and the communication, if made *bonâ fide*, is privileged and protected (*n*). But if it appear from the terms and language of the communication and the surrounding circumstances of the case that there was any malicious or spiteful feeling actuating the master when making the communication, then it is not protected. If, therefore, it be proved that the bad character given to the servant is false, and that the master knew it at the time he gave it, there is evidence of express malice, and the privilege is annihilated. If the master characterises his servant as a "bad-tempered, lazy, impertinent fellow," and the servant brings forward persons with whom he has previously lived who give him a good character, and contradict the allegation of his bad temper, laziness, and impertinence, it is incumbent

(*l*) *Pattison* v. *Jones*, 8 B. & C. 578. (*m*) *Child* v. *Affleck*, 9 B. & C. 403.
(*n*) *Gardner* v. *Slade*, 13 Q. B. 801.

on the master to give some general evidence, showing that he had a reasonable ground for using the language he did use, and that the statement was not totally unfounded and wholly devoid of truth. If he fails to give some general evidence of this sort, the charge against the servant will be considered reckless and unfounded, and there will be evidence of malice for a jury. "Unquestionably," observes Lord Alvanley, C. J., "the master who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character to be false; and the question between the master and the servant will always in such case be, whether what the former has spoken of the latter be malicious and defamatory" (*o*).

Where the defendant having been asked for the character of her governess, and why she parted with her, stated that it was "on account of her incompetency, and not being ladylike nor good-tempered," and it was shown that the governess had served the defendant above a year in that capacity, and had been twice favourably recommended by her during that year to other persons for a situation as governess, and general evidence was given of her competency, good temper, and ladylike manners by witnesses who were her personal friends, it was held that this evidence required some answer on the part of the defendant, and that in the absence of any evidence of the incompetency, bad manners, or bad temper of the governess, there was proof of malice for the jury. "If," observes Patteson, J., "the plaintiff makes out a *primâ facie* case of malice, it certainly lies on the defendant to answer it. When it is said that he must prove the truth of his statement, it is not meant in the sense of truth absolutely; but he must show that the assertion was made with an honest belief of its being the truth" (*p*).

Where a libel imputed to the plaintiff incompetency and unskilfulness in a particular transaction in which the plaintiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skilfulness, without meeting the specific instance relied upon by the plaintiff (*q*).

Where the plaintiff, being secretary of an association called the Brewers' Company, was dismissed for alleged misconduct, and the defendant, who was a director of the company, and also a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, called the attention of the directors of the last-named company to the plaintiff's misconduct and dismissal from the secretaryship of the other company, alleging that he had been charged with obtaining money from the solicitors of the company by false pretences, and taking

(*o*) *Rogers* v. *Clifton*, 3 B. & P. 591. (*p*) *Fountain* v. *Boodle*, 3 Q. B. 11.
(*q*) *Brine* v. *Bazalgette*, 3 Exch. 694.

up a bill of his own with it, it was held that the defendant might properly, in his character of director of the Necropolis Company, make the communication he did, although it charged the plaintiff with the actual commission of the offence imputed to him, or amounted to an assertion on the defendant's part that he believed the charges to be true; for it was both his duty and interest to make the communication; and it was held that, in order to render the defendant liable in damages, actual malice must be shown, in the shape of proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff (*r*).

Where the defendant, having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each, in the absence of the other, that (he or she) was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other, it was held that the statement was privileged (*s*).

Comments in excess of the privilege.—"The proper meaning of a privileged communication," observes Parke, B., "is only this, that the occasion on which the communication was made rebuts the inference of malice *primâ facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact, *i.e.* that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made" (*t*). This may be established by the language of the communication itself, by showing that it was made in virulent and abusive terms, and that the words used were stronger than the occasion justified. When the communication is in writing, the jury are entitled to look at and read the writing, in order to judge of its true character.

"Any one, in the transaction of business with another, has a right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; but he has no right to make defamatory comments on the motives or conduct of the party with whom he is dealing." Where, therefore, the defendant claimed a sum of money from the plaintiff, and the plaintiff's clerk wrote, by direction of the plaintiff, to the defendant, telling him that the plaintiff denied his liability, whereupon the defendant wrote to the clerk, alleging facts in support of his claim, and added, "this attempt to defraud me is as mean as it is dishonest," it was held that the comment was not privileged, and was libellous and actionable (*u*).

(*r*) *Harris* v. *Thompson*, 13 C. B. 348.
(*s*) *Manby* v. *Witt*, 18 C. B. 544.
(*t*) *Wright* v. *Woodgate*, 2 Cr. M. & R. 577.
(*u*) *Tuson* v. *Evans*, 12 Ad. & E. 733.

Of the effect of addressing privileged communications to a wrong party by mistake.—It does not appear to have been expressly decided, whether an honest mistake, made in sending a privileged communication to the wrong person, destroys the privilege, and subjects the party making the communication to an action; or how it would be if a gentleman, asked by letter for the character of a servant, should, *bonâ fide*, write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address the letter to another person, different from the inquirer, although of the same name (*x*).

Reports of trials containing defamatory matter.—"Newspapers and other publications," observes Tindal, C. J., "which narrate what passes in courts of justice, are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible that, on several occasions, they do, to a certain extent, serve the cause of public justice. They ought therefore to be privileged, but their privilege must be restrained to occasions in which they publish fairly what passes in court. Everybody knows that the statement of counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. If, therefore, after a cause has been tried, a defamatory statement by counsel, which the evidence has not at all supported, is published in a newspaper, the publication is not privileged, because it is not a fair account of what passed in court" (*y*). The cases in which reports of legal proceedings, whether *ex parte* or not, have been held to be libellous and actionable are, where the account published has been false or highly coloured, or where the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or conduct of others (*z*), or where the matters given in evidence and published are of a grossly scandalous, blasphemous, or immoral character (*a*).

Publications of ex-parte statements and of proceedings preliminary to a trial.—"We are not prepared," observes Lord Campbell in a recent case, "to lay down for law, that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in *Duncan* v. *Thwaites* (*b*), lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful, where the party accused has been committed or held to bail for an indictable offence; there the actual pendency of a prosecution was a main ingredient in the decision: but where the party accused has neither been committed nor held to bail, but

(*x*) *Harrison* v. *Bush*, 5 Ell. & Bl. 350.

(*y*) *Saunders* v. *Mills*, 6 Bing. 218. *Hoare* v. *Silverlock*, 9 C. B. 20; 19 Law J., C. P. 215. *Beauchamps* (*Ld.*) v. *Croft*, Dyer, 285 a. *Curry* v. *Walter*, 1 B. & P. 525.

(*z*) *Stiles* v. *Nokes*, 7 East, 492. *Lewis* v. *Clement*, 3 B. & Ald. 710. *Andrews* v. *Chapman*, 3 C. & K. 288.

(*a*) *Rex* v. *Carlile*, 3 B. & Ald. 169.

(*b*) 3 B. & C. 556.

absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it" (*c*).

The privilege is not confined to the publication of the proceedings of the superior courts. The dignity of the court cannot be regarded, and "no distinction can be made for this purpose between a court of *pie poudre* and the House of Lords."

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful; but while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. But "if magistrates publicly hear slanderous complaints respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an ale-house" (*d*).

Publication of speeches and proceedings in parliament.—Information printed merely for the use of members of parliament and circulated amongst them is privileged, but writings containing defamatory matter, though printed for the use of members, cannot lawfully be circulated amongst those who are not members of parliament (*e*). A member of parliament may make what reflections he pleases upon the character of others from his place in the House of Commons, but if he prints and publishes his speeches he will be responsible in damages if they are of a libellous character (*f*).

Defamatory reports of proceedings at vestries and public meetings.—The principle which protects newspaper proprietors and others, who publish a fair and correct statement of what takes place in courts of justice, does not extend to protect the publication of reports, speeches, and proceedings

(*c*) Ld. Campbell, *Lewis* v. *Levy*, Ell. Bl. & Ell. 557; 27 Law J., Q. B. 289.

(*d*) Ib. 288. *M'Gregor* v. *Thwaites*, 3 B. & C. 24.

(*e*) *Stockdale* v. *Hansard*, 9 Ad. & E. 1.

(*f*) *Rex* v. *Creevey*, 1 M. & S. 280. *Rex* v. *Ld. Abingdon*, 1 Esp. 226; cited 26 Law J., Q. B. 107; 7 Ell. & Bl. 233.

at vestries and public meetings, or meetings of commissioners appointed to be holden by statute for public purposes. "At such meetings," observes Lord Campbell, "things may be said very relevant to the subject in hand, but very calumnious; and in what an unhappy situation the calumniated person would be, if the calumny might be published, and yet he could not bring an action and challenge the printer and publisher of the libel to prove its truth" (*g*).

Reviews and criticisms upon authors.—"Every man," observes Lord Ellenborough, "who publishes a book, commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right; but if he follows the author into domestic life for the purpose of slander, that will be libellous. Authors are liable to criticism, to exposure, and even to ridicule, if their compositions are ridiculous, otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error." "The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash. I speak of fair and candid criticism, and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled" (*h*).

"The editor of a public newspaper," observes Lord Kenyon, "may fairly and candidly comment on any place or species of public entertainment, but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the public. If fairly done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is malevolent, and exceeds the bounds of fair opinion, then it is a libel and actionable" (*i*).

Criticisms by one public journalist upon another.—It is competent to one public writer to criticise another and ridicule his sentiments and opinions, but he is not justified in making calumnious remarks on the private character of the individual, or imputing to him sordid and dishonest motives, or base and dishonourable conduct. In that respect, the editor of a newspaper enjoys a right of protection in common with every other subject (*k*). A paragraph in one newspaper, charging another with

(*g*) *Davison* v. *Duncan*, 7 Ell. & Bl. 231; 26 Law J., Q. B. 106; 7 H. & N. 89. *Popham* v. *Pickburn*, 31 Law J., Exch. 133.

(*h*) *Carr* v. *Hood*, cited in *Tabart* v. *Tipper*, 1 Campb. 357.

(*i*) *Dibdin* v. *Swan*, 1 Esp. 26.

(*k*) Ld. Ellenborough, *Stuart* v. *Lovell*, 2 Stark. 97. *Campbell* v. *Spottiswoode*, 32 Law J., Q. B. 185; 11 W. R. 569.

being a vulgar, ignorant, and scurrilous journal, is not actionable; but it is otherwise if it asserts that it is in low circulation, and calls the attention of advertisers to the fact, as the plain object of it is to damage the sale of the paper, and diminish the profits from advertising (*l*).

Works of art are as much the subjects of criticism as the writings of an author. "Any man has a right," observes Lord Tenterden, "to express his opinion of them; and however mistaken, in point of taste, that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression, although through the medium of ridicule. If it is unfair and intemperate, and written for the purpose of injuring the artist in his profession, it is actionable" (*m*).

Criticism upon handbills and advertisements.—If a man circulates a printed handbill, or posts it up in a public thoroughfare, or advertises in the public papers, the handbill, or the advertisement, is as much open to fair and candid comment and criticism as any published book or pamphlet. But those who criticise it must not go out of their way to impute motives, and make reflections upon private character not fairly warranted by the terms and tendency of the writing or advertisement (*n*).

Criticisms upon sermons.—The law permits comments to be made upon the sermons delivered by clergymen from their pulpits, provided the comments are fairly, justly, and truly made. A clergyman also may be fairly characterised as a remarkably bad preacher, or as a preacher of erroneous doctrines, and if the parson sustains an injury from the criticism, it is injury for which there is no redress at law by damages. But all reflections upon the private character or private conduct of the clergyman, calculated to bring him into disrepute with his parishioners, is libellous and actionable. The preaching of a sermon in the ordinary mode of a clergyman's duty in the parish church does not make the sermon public property, so as to invite observation upon it, and authorise the same freedom of criticism and comment from the press in general, as is extended to the publication of a literary work (*o*).

Comments upon the public character of public men.—There is a wide difference between publications relating to public and private individuals. Every subject has a right to comment upon those acts of public men which concern him as a subject of the realm, if he do not make his commentary a vehicle for malice and the indulgence of some private spite or pique. "You have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor, but you have no right to

(*l*) *Heriot* v. *Stuart*, 1 Esp. 436.
(*m*) *Soane* v. *Knight*, 1 M. & M. 74.
(*n*) *Paris* v. *Levy*, 30 Law J., C. P. 11.
(*o*) *Gathercole* v. *Miall*, 15 M. & W. 344. *Hearne* v. *Stowell*, 12 Ad. & E. 719.

impute to them such conduct as disgraces and dishonours them in private life" (*p*).

Disparaging criticisms by one tradesman upon the goods of a rival tradesman are not actionable, unless it be proved that they have been maliciously and fraudulently made, and were false to the knowledge of the party at the time they were made. Thus, where a mineral oil-merchant got a chymist to test the quality of a mineral oil he had imported, and compare it with the oil sold by a rival oil-merchant, and then printed and circulated the chymist's report, which spoke disparagingly of the plaintiff's oil in comparison with the oil of the defendant, it was held that this report was no libel upon the plaintiff if it was the result of a *bonâ-fide* examination and comparison of the two oils, and contained nothing that was false to the knowledge of the defendant at the time he published and circulated it (*q*).

SECTION II.

OF VERBAL SLANDER.

When defamatory words are actionable.—The old cases respecting the liability of parties for the utterance of verbal slander are of the most unsatisfactory and contradictory character. "They are," observes Pratt, C. J., "very odd cases" (*r*). At one period the courts seem to have regarded actions for slander, by word of mouth, with great disfavour, and to have done all they could to discourage them; at another time they favoured the action, because men's tongues were growing more and more virulent and dangerous, and people were apt to take the law into their own hands, and revenge themselves on the slanderer if they failed to obtain redress in a court of justice (*s*). In some cases we find judges complaining of the growth of actions for verbal slander, saying that they would spoil all communications between man and man, and repress all expression of opinion, so that one would be afraid to speak disparagingly of the accommodation afforded by a particular inn, or of the wine sold therein, or of the surveys furnished by a particular surveyor (*t*). At another period we find judges lamenting the frequency of scandals and the license given to the tongue of the slanderer, and expressing their surprise that cases are to be found in the books in which a clergyman

(*p*) *Parmiter* v. *Coupland*, 6 M. & W. 108.
(*q*) *Young* v. *Macrae*, 32 Law J., Q. B. 6; 7 L. T. R., N. S. 354; 11 W. R. 63.
(*r*) *Button* v. *Heyward*, 8 Mod. 24.
(*s*) *Harrison* v. *Thornborough*, 10 Mod. 198.
(*t*) *King* v. *Lake*, 2 Ventr. 28. *Crofts* v. *Brown*, 3 Bulstr. 167.

failed to obtain compensation in damages for an imputation of adultery (*u*), and that a schoolmistress had been declared incompetent to maintain an action for verbal charges of prostitution (*x*).

"The opinions of later times," observes Holt, C. J., "have been in many instances different from those of former days in relation to actions for words, and judgments have gone different ways. These actions for words are scrambling things, that have gone backwards and forwards. And I have heard my Lord Hale and Justice Twisden say, that they knew no set rule for actions for words, but that all words stood upon their own feet. It is not worth while to be learned on the subject, but for my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace" (*y*).

Defamatory words not actionable without special damage.—As the law at present stands, mere vituperation and abuse by word of mouth, however gross, is not actionable, unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Thus, to call a man a scoundrel, or blackguard, or a swindler, or a rogue, or to say of a man, "You are a fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores," is not actionable (*z*). Neither is it actionable to call a man a blackleg, unless it be shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler (*a*); nor to say of a young lady that she is a notorious liar, an infamous wretch, and has been all but seduced by a notorious libertine (*b*). Words imputing to a lady that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable without special damage (*c*); nor the words, "He is a rogue, and has robbed and cheated his brother-in-law of upwards of 2000*l*." (*d*).

Defamatory words actionable per se without proof of any special damage.—But words imputing an indictable offence are actionable *per se* without proof of any special damage, as they render the accused party liable to the pains and penalties of the criminal law; such as words imputing felony, bigamy (*e*), forgery, the receipt of stolen goods, knowing them to be stolen (*f*); the careless or unskilful administration of mercury, or any other poisonous or dangerous drug, and thereby causing death (*g*); the

(*u*) *Parrot* v. *Carpenter*, Cro. Eliz. 502; Noy. 64.
(*x*) Per Twisden, J., *Wharton* v. *Brook*, 1 Ventr. 21. *Wilby* v. *Elston*, 8 C. B. 142. Ld. Denman, C. J., *Ayre* v. *Craven*, 2 Ad. & E. 7.
(*y*) *Baker* v. *Pierce*, 6 Mod. 24. Fortescue, J., *Button* v. *Heyward*, 8 Mod. 24.
(*z*) *Lumby* v. *Allday*, 1 Cr. & Jerv. 301. *Savile* v. *Jardine*, 2 H. Bl. 531.
(*a*) *Barnett* v. *Allen*, 3 H. & N. 376; 27 Law J., Exch. 412.
(*b*) *Lynch* v. *Knight*, 8 Jur. N. S. 724.
(*c*) *Wilby* v. *Elston*, 8 C. B. 142.
(*d*) *Hopwood* v. *Thorn*, ib. 313.
(*e*) *Heming* v. *Power*, 10 M. & W. 570.
(*f*) *Alfred* v. *Farlow*, 8 Q. B. 854.
(*g*) *Edsall* v. *Russell*, 5 Sc. N. R. 801.

keeping of a bawdy-house (*h*), or the doing of any other criminal or indictable offence. But words conveying only a vague sort of suspicion in the mind of the speaker (*i*), uttered *bonâ fide* with a view of obtaining information, or by way of warning, or spoken in grief and sorrow, for the news (*k*) will not create any cause of action, as the circumstances rebut the presumption of malice; nor any words of mere suspicion or opinion, which do not convey any positive imputation of guilt (*l*); but if a man says of another, "I am thoroughly convinced you are guilty of stealing, &c. &c.," this is equivalent to a positive averment of the fact (*m*).

In what cases actionable words are rendered not actionable by precedent or subsequent words.— Simply to call a man "thief" is *primâ facie* actionable, as it imputes felony, but if it appears that the word was used as a mere term of abuse, and that there was in point of fact no imputation of actual theft conveyed by them, there is no cause of action. Thus, where the defendant said of the plaintiff "he is a damned thief, and so was his father before him," but it appeared that the words were uttered in the heat of anger during a conversation respecting the plaintiff's refusal to pay over some money which he had received as executor, Lord Ellenborough directed a nonsuit, saying that it was manifest from the whole conversation that the words as used did not impute a felony (*n*). "The jury," observes Mansfield, C. J., "ought not to find for the plaintiff, if from the accompanying words or the surrounding circumstances they believe that the defendant did not intend to impute actual theft to the plaintiff (*o*).

Where the defendant said of the plaintiff "thou art a thief, for thou hast taken my beasts under an execution, and I will hang thee," it was held that there was no actionable slander, for the reason given for the plaintiff's being a thief, manifestly showed that he was no thief at all, and that no theft had been committed (*p*).

Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder are actionable *per se*. Thus, to say seriously and positively of a person that he has got the leprosy, or the pox, is actionable, without proof of any special damage, because it causes him to be shunned and avoided by society (*q*). The imputation must refer to the time present, and not the time past, for words are not actionable which merely impute to the plaintiff that at some previous period he had the disease (*r*).

(*h*) *Brayne* v. *Cooper*, 5 M. & W. 250.
(*i*) *Tozer* v. *Mashford*, 6 Exch. 539.
(*k*) *Crawford* v. *Middleton*, 1 Lev. 82.
(*l*) Com. Dig. Action on the case for defamation, F. 13.
(*m*) *Peake* v. *Oldham*, Cowp. 275.
(*n*) *Thompson* v. *Bernard*, 1 Campb. 47. *Christie* v. *Cowell*, Peake, N. R. 5.
(*o*) Mansfield, C. J., *Penfold* v. *Westcote*, 5 B. & P. (2 N. R.) 335.
(*p*) *Wilk's* case, 1 Roll. Abr. 51. *Brittidge's* case, 4 Rep. 19. Bac. Abr. SLANDER, R.
(*q*) *Bloodworth* v. *Gray*, 7 M. & Gr. 334; 8 Sc. N. R. 9. *James* v. *Rutlech*, 4 Rep. 17 b.
(*r*) *Carslake* v. *Mapledoram*, 2 T. R. 475.

Defamatory words concerning tradesmen and professional men, spoken of them in the way of their trade or profession, will sustain an action when such words would not be actionable when spoken of a person having no trade or profession (*s*). Words imputing to a tradesman fraudulent conduct in the transaction of business, such as the use of false weights, are actionable *per se*, without proof of special damage (*t*); and so are words imputing to a tradesman that he is in the constant habit of cheating and defrauding his customers, and those who deal with him (*u*), and words imputing bankruptcy or insolvency to a person engaged in trade, such as "if he does not come and make terms with me, I will make a bankrupt of him, and ruin him" (*x*).

But "if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way;" and, consequently, it is not actionable for one tradesman to depreciate the wares and merchandise of another in comparison with his own. So long as it is a mere puff by one of two rival tradesmen, recommending his own articles in preference to those of another, it is defensible on account of the interest the defendant has in the matter; but to say generally of a tradesman that he is in the habit of selling goods which he knows to be bad, is actionable (*y*).

Words imputing misconduct, or gross ignorance or incapacity, to professional men, in the discharge of their professional duties, are actionable *per se*, without proof of any special damage; such as words imputing to a practising physician that he is a quack and a mountebank (*z*), or that he has killed a patient through ignorance of the first principles of his profession (*a*); or words imputing to a surgeon or accoucheur the want of a proper qualification for his profession or business, or the want of skill, or of any professional requisite, or that his character is so bad amongst his professional brethren that they will not meet him (*b*); but words conveying an imputation against a medical man not necessarily connected with his profession, such as a general imputation of adultery, are not actionable (*c*); but if the statement be, that he has seduced or committed adultery with one of his patients, it would be otherwise.

Words imputing to a barrister that he has wilfully and corruptly deceived his client, and revealed the secrets of his cause, or that he has given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable (*d*); and so are words

(*s*) Per Cur. *Harman* v. *Delany*, 2 Str. 898.

(*t*) *Griffiths* v. *Lewis*, 7 Q. B. 65.

(*u*) *Reeve* v. *Holgate*, 2 Lev. 62.

(*x*) *Brown* v. *Smith*, 13 C. B. 599. Ld. Denman, C. J., *Robinson* v. *Marchant*, 7 Q. B. 918.

(*y*) *Evans* v. *Harlow*, 5 Q. B. 633.

(*z*) *Goddart* v. *Haselfoot*, 1 Roll. Abr. 54.

(*a*) *Tutty* v. *Alewin*, 11 Mod. 221.

(*b*) *Southee* v. *Denny*, 1 Exch. 196.

(*c*) *Ayre* v. *Craven*, 2 Ad. & E. 2.

(*d*) *Snag* v. *Gray*, 1 Roll. Abr. 57. *King* v. *Lake*, 2 Ventr. 28.

imputing to a practising attorney that he is well known to be a corrupt man, and to deal corruptly in his profession (*e*); or words imputing to him that he betrays the secrets of his clients, or that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of mal-practice, or is a cheat, a rogue, or a knave in his profession (*f*). But mere vituperative language or general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession. Thus, to call an attorney a cheating knave is not actionable, but to say that he cheats his clients is actionable (*g*). In all actions founded on words imputing to a professional man conduct which disgraces and injures him in his profession, it must be averred and proved that the plaintiff was in the exercise and practice of his profession at the time of the utterance of the slander; for if he has ceased to exercise his profession or employment at the time the words are spoken, the words are not actionable, on the ground that they were spoken of him in his profession (*h*).

To say of a beneficed clergyman that he is drunk in church, or that he preaches false doctrine, lies, and malice, and ought to be degraded (*i*), or that he is an old rogue, and a contemptible fellow, hated and despised by his parishioners (*k*), or that he has preached a seditious sermon, and has moved the people to sedition (*l*), is actionable: words also imputing fraudulent and dishonest conduct to a beneficed clergyman in some clerical matter (*m*), or accusing him of incontinence, or the preaching of false doctrine, are actionable, as they tend to injure him in his professional character, and, if true, to subject him to a deprivation of his benefice, and to a degradation of orders, and, consequently, to a loss of temporal emolument. But if at the time of the speaking of the words the plaintiff is not beneficed, and is not in the actual receipt of professional beneficial emolument as a preacher, lecturer, curate, or the like, there is no actual damage, and an action for slander is not maintainable. "If the plaintiff be in orders merely, and not in possession of any temporal advantage, as having professional occupation, the only remedy appears to be in the Ecclesiastical Court" (*n*). And whenever the words imply only general abuse, and do not affect the plaintiff in his professional and clerical character, they are not actionable without proof of special damage (*o*).

Words imputing official misconduct to a person in an office of profit or

(*e*) *Birchley's* case, 4 Rep. 16 a, pl. 6.

(*f*) *Banks* v. *Allen*, 1 Roll. Abr. 54. *Baker* v. *Morfue*, Sid. 327. *Day* v. *Buller*, 3 Wils. 59.

(*g*) *Alleston* v. *Moor*, Het. 107.

(*h*) *Bellamy* v. *Burch*, 16 M. & W. 590.

(*i*) *Dodd* v. *Robinson*, Aleyn, 63. *Cranden* v. *Walden*, 3 Lev. 17; 1 Roll. Abr. 58.

(*k*) *Musgrave* v. *Bovey*, Str. 946.

(*l*) *Brittridge's* case, 4 Co. 19 b.

(*m*) *Pemberton* v. *Colls*, 11 Q. B. 461; 16 Law J., Q. B. 403.

(*n*) *Gallwey* v. *Marshall*, 9 Exch. 295; 23 Law J., Exch. 78.

(*o*) *Pemberton* v. *Colls*, 10 Q. B. 473; 16 Law J., Q. B. 403.

trust are actionable *per se*. Thus, to say publicly of a man who is in the enjoyment of an office of honour, profit, or trust, that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes, is actionable; but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage (*p*). Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for, or misconduct in, his office; for if they impute to him only general misconduct and unfitness for his situation, they will fail to support an action, without proof of special damage (*q*).

Words rendered actionable by reason of special damage.—If any special damage has been sustained by the plaintiff by reason of the utterance of slanderous words, an action for damages is then maintainable. Thus, to say of a spinster that she is in the family way, or that she has had a child, is not *per se* actionable; but if the girl is about to be married, and she loses her marriage in consequence of the utterance of the slander, a very grave cause of action arises (*r*). If, in consequence of the utterance of slanderous words by the defendant, the plaintiff has lost a situation, or been refused employment, there is special damage resulting from the wrongful act, capable of maintaining an action. Thus, where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplainship, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplainship was a temporal preferment (*s*). But loss of the society, comfort, and attention of friends; or the loss, by a married woman, of her husband's society and conjugal attentions by reason of slander, is insufficient "special temporal damage" to support an action (*t*), unless the slander amounts to an imputation of adultery on the wife, and the husband leaves her in consequence of such imputation (*u*).

Slanderous denunciations from the pulpit causing loss of custom, situation, or employment.—If a priest or clergyman, or minister of any religious denomination, singles out any particular member of his congregation, and denounces him for misconduct in his trade or profession, or in the execution of any office of trust, or if he defames him generally, and slanders him in the face of the congregation, whereby he loses a situation, or is dismissed from his employment, and sustains special damage, the priest or clergyman will be answerable in damages, if he cannot prove the truth

(*p*) Bac. Abr. SLANDER, B.
(*q*) *Lumby* v. *Allday*, 1 Cr. & J. 301. *Hopwood* v. *Thorn*, 8 C. B. 313.
(*r*) *Davis* v. *Gardiner*, 4 Co. 16 b, pl. 11.
(*s*) *Payne* v. *Beaumorris*, 1 Lev. 248.
(*t*) *Lynch* v. *Knight*, 9 Jur. N. S. 724.
(*u*) Per Ld. Campbell and Ld. Cranworth, ib. 731.

of the charge he makes; for no minister of religion has a right to propagate slander under the guise of disseminating religious truth or repressing vice (*v*). Where the plaintiff, in his declaration of his cause of action, set forth that he was a parishioner of S——, and that the defendant being the vicar there, and intending to scandalize the plaintiff and bring him into bad repute with his neighbours, and cause them to shun his company, did, in the time of divine service, in the church, in the hearing of the parishioners, maliciously pronounce the plaintiff excommunicated, by virtue of a certain instrument of excommunication, alleged to have been received by him from the ordinary, whereas the defendant had received no such instrument, nor was the plaintiff excommunicated, by which means the plaintiff was scandalized and prevented from going to church, and was put to great trouble and expense on showing his innocency, &c., it was held that the declaration disclosed a good cause of action (*x*).

Effect of the dismissal of a slandered servant, being a wrongful dismissal on the part of the master.—Where the plaintiff had been hired by his master by the year, and his master wrongfully dismissed him, in consequence of some slanders respecting him, circulated by the defendant, which were not actionable without special damage, it was held that, as the dismissal was a wrongful act on the part of the master, for which he was answerable in damages to the plaintiff, there was no special damage resulting to the plaintiff capable of sustaining an action against the defendant. "The supposed special damage," observes Lawrence, J., "was the loss of the advantages to which the plaintiff was entitled under his contract with his master; but he could not be considered in law as having lost them, for he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service." "The special damage," further observes Lord Ellenborough, "must be the legal and natural consequence of the words spoken, and here it is an illegal consequence: a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse-pond, by way of punishment for his supposed transgression" (*y*).

Effect of the slander being disbelieved by the master.—If the dismissal of the servant has been caused by the utterance of the slander against him, the special damage results from the slander, so as to render an action maintainable, although the master did not believe in the slander, and did not dismiss the servant, because he thought him guilty of the charge

(*v*) *Gilpin* v. *Fowler*, 9 Exch. 625; 23 Law J., Exch. 152.

(*x*) *Barnabas* v. *Traunter*, Mich. 16 Car. B. R., 1 Vin. Abr. 396.

(*y*) *Vicars* v. *Wilcocks*, 8 East, 3.

made against him, or considered him untrustworthy. Thus, where the plaintiff set forth that she was a strawbonnet-maker, in the employ of a Mrs. Enoch, and that the defendant, who was the landlord, came to her mistress, and told her that the plaintiff tapped at the windows, and conducted herself shamefully and disgracefully, so that the house looked like a bawdy-house, and Mrs. Enoch dismissed the plaintiff, but stated in her evidence that she did not dismiss her because she believed what the defendant told her, but because he was her landlord, and she was afraid he would be offended if she did not send the plaintiff away after what he had said; it was held that the dismissal was the consequence of the slanderous words, and that damages were recoverable in respect thereof, although the mistress, to whom the slander was uttered, did not believe it (*z*).

Special damage, not being the immediate and natural consequence of the words spoken — Spontaneous and unauthorised repetition of verbal slander. — Whenever proof of special damage is necessary to maintain an action of slander, it must appear that the special damage is the immediate and natural consequence of the words spoken (*a*). If, therefore, the use of slanderous words by the defendant, not actionable *per se*, would have wholly failed to produce any injurious consequence, unless aided by the act of another, the injury resulting from that act of the other is not to be ascribed to the defendant. A spontaneous and unauthorised repetition of slanderous words, is not the necessary consequence of the original uttering of the words; and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the slander by persons who had no authority from him to repeat what he had said.

Thus, where the substance of the plaintiff's allegation of special damage was, that by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff, and the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer, so that the repetition of the words, and not the original statement, occasioned the plaintiff's damage, it was held that the action was not maintainable. "Every man," observes Tindal, C. J., "must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorised communication cannot be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for

(*z*) *Knight* v. *Gibbs*, 1 Ad. & E. 46. (*a*) *Vicars* v. *Wilcocks*, 8 East, 3.

whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We therefore think that, as each count in the declaration alleges as the only grievance the original false speaking of the words, the allegation that, 'by reason of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence" (*b*).

But where the utterer of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known duty it is to repeat it, he is responsible for the repetition of it. It is then his act, and is the natural and necessary result of the utterance of the words (*c*).

Special damage directly resulting from the repetition of oral slander.—Whenever loss of situation, or employment, or any other special damage is the direct consequence of the utterance of oral slander, the utterer is responsible, whether he is himself the original author of the scandal, or whether he merely repeats what he has heard some one else say. A man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true. "As great an injury may accrue from the wrongful repetition as from the first publication or utterance of slander. The person who repeats it may give greater weight to the calumny, and may be actuated by greater malice than the original utterer" (*d*).

Circumstances rebutting the presumption of malice.—If the circumstances connected with the utterance of the words rebut the presumption of malice, there is no cause of action. Thus, where the plaintiff brought an action against one for falsely and maliciously saying of him that he had heard he was hanged for stealing a horse, and on the evidence it appeared that the words were spoken in grief and sorrow for the news, Hobart, J., caused the plaintiff to be nonsuited, for it was not said maliciously (*e*). We have seen that there is a wide difference between statements made with a view to inquiry and information by parties seeking to ascertain the truth, and who profess to know nothing themselves upon the subject of their inquiry, and statements made by persons who profess to have information, and to communicate that information to another. But a person cannot shelter himself from the consequences of having made a slanderous imputation upon a man's character by saying that he did not volunteer the statement, but made it honestly, believing it to be true, in answer to a question that was put to him (*f*).

(*b*) *Ward* v. *Weeks*, 4 M. & P. 808; 7 Bing. 211. *Parkins* v. *Scott*, 1 H. & C. 153; 31 Law J., Exch. 331.

(*c*) *Kendillon* v. *Maltby*, Car. & M. 402.

(*d*) *M'Pherson* v. *Daniels*, 10 B. & C. 273. *Tidman* v. *Ainslie*, 10 Exch. 63.

(*e*) *Crawford* v. *Middleton*, 1 Lev. 82.

(*f*) *Griffiths* v. *Lewis*, 7 Q. B. 64.

Privileged communications by word of mouth—Proof of malice.—We have already seen that many communications and statements of a slanderous character are privileged, either on the ground that they have been made in the course of a judicial proceeding (ante, p. 684), or in discharge of some public or private duty, or by parties having some pecuniary or family interest in the subject-matter of the communication (ante, pp. 688–690), or that the communication was made in answer to inquiries respecting the character of a servant (ante, pp. 691–694), and that the occasion and circumstances repel the presumption of malice. Thus, we have seen that an action for slander is not maintainable against a defendant for charging the plaintiff with felony before a magistrate (*g*); nor against witnesses in a court of justice for false and scandalous statements made by them whilst giving their evidence upon oath (*h*); nor by a servant against his former master for defamatory words spoken by the latter in giving the character of such servant (*i*).

Where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, that he afterwards came to the defendant's and had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you as bad as him;" it was held, that the verbal statement being honestly made by a master as a warning to his servants was a privileged communication, and that it was incumbent on the plaintiff to give some evidence of malice in order to raise a question for the jury (*k*). And where a vestry meeting was held for the purpose of nominating and electing constables, and hearing and deciding upon any objections that might be brought forward against any of the candidates for the office, and the defendant, a ratepayer, made a statement imputing perjury to the plaintiff, who was one of the candidates, and said that he was a person not to be believed on his oath, it was held that the statement was privileged and protected if it was *bonâ fide* and honestly made in full belief of its truth, and that it was incumbent on the plaintiff to bring forward evidence of his general character for truthfulness in order to raise the question as to whether the defendant in making the statement had been actuated by any malicious motive (*l*). But although a man who makes a charge against another may be justified by the occasion in making it, yet he may make the charge in such a way, accompanied by such expressions and under such circumstances, as furnish proof that it was made maliciously (*m*). When once a confidential rela-

(*g*) *Ram* v. *Lamley*, Hutt. 113; ante, pp. 684, 685.

(*h*) *Revis* v. *Smith*, 18 C. B. 126; 25 Law J., C. P. 195.

(*i*) *Weatherston* v. *Hawkins*, 1 T. R. 110.

(*k*) *Somerville* v. *Hawkins*, 10 B. C. 590.

(*l*) *Kershaw* v. *Bailey*, 1 Exch. 743.

(*m*) *Senior* v. *Medland*, 4 Jur. N. S. 1039.

tion is established between two persons with regard to an inquiry of a private nature, in which they are mutually interested, whatever takes place between them relative to the same subject at subsequent interviews, may be as much privileged as what passed at the original interview (*n*).

Privileged charges of felony made bonâ fide, with reasonable grounds for suspicion.— For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime. "It is argued," observes Coleridge, J., "that the charges ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must I not say why I do so? The presence of other parties would not do away with the privilege." It is for the jury to say whether the circumstances warranted the charge made by the defendant, whether it was made *bonâ fide*, or before more persons than was necessary, or in language stronger than the occasion justified (*o*).

Defamatory statements by a party in open court conducting his own cause are privileged and protected, if they are relevant to the subject-matter of inquiry, or are spoken during the heat and excitement of a trial. "The party himself," observes Holroyd, J., "from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge should be sufficient to restrain him within due bounds" (*p*).

Privileged statements and comments by advocates in the course of judicial proceedings, or in the conduct of a cause.— "If a counsel (or an attorney acting as an advocate) speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions" (*q*). The freedom of speech at the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court unless considerable latitude were allowed to the advocate, and if any evil follow therefrom, it must be endured for the sake of the greater good which attends it. "A counsellor, therefore, hath a privilege to enforce anything which is informed unto him for his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false" (*r*). It is pertinent to the cause for counsel to comment both

(*n*) *Beatson* v. *Skene*, 5 H. & N. 855; 11 Ir. C. L. R. 485.

(*o*) *Padmore* v. *Lawrence*, 11 Ad. & E. 382. *Amann* v. *Damm*, 8 C. B., N. S. 597; 7 Jur. N. S. 47.

(*p*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 244; Roll. Abr. 87, pl. 4. *Revis* v. *Smith*, 18 C. B. 126; 25 Law J., C. P. 195.

(*q*) *Wood* v. *Gunstone*, Styles, 462. *Mackay* v. *Ford*, 29 Law J., Exch. 404.

(*r*) *Brook* v. *Sir H. Montague*, Cro. Jac. 90.

on the facts proved and on those which he might expect to prove, and he may indulge freely in any calumnious imputation which the facts before the court, whether true or false, appear to warrant. "It would be impossible," observes Abbott, J., "that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; but they ought not to avail themselves of their situation maliciously to utter words wholly unjustifiable. Where, therefore, an attorney was mixed up in the concoction of a pretended cause of action, and in suing for a sum of money when he knew that there was no legal claim and that the action must fail, and the counsel of the defendant said that the action was founded in the knavery of the attorney, that it was one of the most profligate things ever done by a professional man, and that the attorney was a fraudulent and wicked attorney, it was held that these observations and expressions of opinion were privileged. "Perhaps," observes Lord Ellenborough, "the words were too strong, and, in the exercise of a candour fit to be adopted, might have been spared. But still a counsel might, *bonâ fide*, think the expressions justifiable under the circumstances" (*s*).

Privileged comments and charges by judges and magistrates in the exercise of the duties of their office.—We have already seen that judges are not responsible for slanderous words spoken by them concerning private individuals, if the words are material and relevant to the cause or matter in issue before them. "Neither party, witness, counsel, jury, or judge, can be put to answer civilly or criminally for words spoken in office" (*t*). But no judge of an inferior court or magistrate has any immunity for slander; and if he goes out of his way to calumniate an individual by uttering charges wholly irrelevant to the matter in issue before him, and not warranted by the occasion, he will be answerable in damages if malice be clearly made out, and there is a want of reasonable and probable cause for the slanderous observations (ante, p. 547). But it is clearly within the sphere of the duty of magistrates to make such comments upon the conduct and demeanour of witnesses and parties coming before them, and upon the character of persons whose conduct is involved in the inquiry before them as the occasion seems to them to warrant, and they are entitled to express their opinions concerning them with the utmost freedom, however erroneous those opinions may be (*u*), provided the proceedings before them are within their jurisdiction, and they have authority to inquire into and adjudicate upon them. An action, therefore, is not maintainable against a coroner for anything said by him whilst he is addressing a jury impanneled before him, however defamatory, false, or

(*s*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 241.

(*t*) *Reg.* v. *Skinner*, Lofft, 55.

(*u*) *Kendillon* v. *Maltby*, 2 Moo. & Rob. 438. *Allardice* v. *Robertson*, 1 Dow. N. S. 514.

malicious in fact it may be (*x*). But if a magistrate has no jurisdiction to hear and determine a particular matter brought before him, and he, nevertheless, proceeds to hear it, and in so doing makes libellous charges and imputations upon others, he will be responsible in damages for the wrong done.

Of the interpretation and application of the words used.—"In former times," observes Pratt, C. J., "words were construed in *mitiori sensu*, to avoid vexatious actions, which were then very frequent; but *distinguenda sunt tempora*, and we ought to expound words according to their general signification to prevent scandals, which are at present too frequent" (*y*). "The rule," observes Lord Ellenborough, "which at one time prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts as they always ought to have been, in the plain, popular sense in which the rest of the world naturally understand them" (*z*). The effect of the words used, and not the meaning of the party uttering them, is the test of their being actionable. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them" (*a*).

Slander of title.—If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realised, this is a slander upon the title of the owner, and gives the latter a claim for compensation in damages, unless the slanderer can prove the truth of his statement (*b*). "An action for slander of title," observes Tindal, C. J., "is not properly an action for words spoken, or for a libel written and published, but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title. It is ranged under that division of actions in the Digests, and by other writers on the text law." The plaintiff, therefore, in order to sustain the action, must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. Where, therefore, a shareholder in a mining company complained of a paragraph in a newspaper, asserting that a bill had been filed in Chancery invalidating his title to his shares, whereby he was injured in his rights and his shares were depreciated in the market, and he was prevented from selling them, it was held that this was not such an allegation of special damage as the law required in such

(*x*) *Thomas* v. *Chirlon*, 31 Law J., Q. B. 189.
(*y*) *Button* v. *Heyward*, 8 Mod. 24.
(*z*) *Roberts* v. *Camden*, 9 East, 96. *Woolnoth* v. *Meadows*, 5 East, 468.
(*a*) *Hankinson* v. *Bilby*, 16 M. & W. 442.
(*b*) *Gutsole* v. *Mathers*, 1 M. & W. 501.

actions; and that the necessity for an allegation of special damage does not in anywise depend upon the medium through which the slander is disseminated; that is, whether it be through words, or writing, or print (*c*). "To support the action," observes Parke, B., "it ought to be shown that the false statement was made *malâ fide*, and that the special damage ensues therefrom. If some portions of the statement are *bonâ fide*, the injured party cannot recover, unless he can distinctly trace the damage as resulting from that part which is *malâ fide*" (*d*).

To enable a party, moreover, to maintain an action for slander of title, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title. If the words are spoken by a stranger, who has no right or business to interfere, the law presumes malice; and if he cannot show the truth of his assertion he is responsible in damages; but if he is himself interested in the matter, and announces the defect of title *bonâ fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted (*e*), and the plaintiff must then show that there was no reasonable or probable ground for the statement. If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposition of the property, the title to which is alleged to be slandered, and has acted *bonâ fide*, though under the influence of prejudice or misconception, he is not responsible in damages unless it be shown that he must have known that there was not the slightest pretence for his interference. "The *bona fides* of the communication," observes Lord Ellenborough, "and not whether a man of rational understanding would have made it, is the question to be canvassed" (*f*).

"Slander of title," observes Maule, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, and therefore its falsehood is given in evidence under Not guilty, since the new rules. It is essential also that it should be malicious; not, as Lord Ellenborough observes, malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true—if there really be the infirmity of title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action" (*g*).

(*c*) *Malachy* v. *Soper*, 3 Sc. 737–739.
(*d*) *Brook* v. *Rawl*, 4 Exch. 524.
(*e*) *Hargrave* v. *Le Breton*, 4 Burr. 2423. *Smith* v. *Spooner*, 3 Taunt. 253.
(*f*) *Pitt* v. *Donovan*, 1 M. & S. 648.
(*g*) *Pater* v. *Baker*, 3 C. B. 868.

SECTION III.

OF ACTIONS FOR LIBEL AND SLANDER.

Consolidation of actions for the same libel.—Where seven different actions were brought against the same defendant, for seven different publications of the same libel to different persons, which might all have been comprised in one action, the court stayed the proceedings in all of them, except one, until that one had been tried (*h*).

Parties to be made plaintiffs.—The party to be made plaintiff in an action for libel or slander, is the person to whom the injury immediately accrues, and not the party indirectly or remotely affected by the libel. Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services, it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that if the libel was injurious to Madame Mara she might have an action for it, but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff therefore was nonsuited (*i*).

An action of slander does not lie by two jointly against a defendant, when the tort which one received by the words spoken was not the tort which the other received; but they ought to sever in their actions, as in the case of false imprisonment (*k*). If, however, defamatory words be spoken of two partners in trade respecting them in their trade, they may maintain a joint action for the slander, averring special damage (*l*).

Parties to be made defendants.—Every publisher and disseminator of written slander is liable to an action for damages, as well as the original inventor, author, or utterer of the calumny. The person who repeats it may, as we have seen, give greater weight to the scandal, and may be actuated by greater malice than the original utterer, and he cannot discharge himself from responsibility by giving up the name of the author or first utterer of the slander. The party slandered may, consequently, maintain an action for damages arising from the publication of written slander against the author and first publisher of the slander, as well as against any subsequent publisher or disseminator thereof, unless the pub-

(*h*) *Jones* v. *Pritchard*, 6 D. & L. 530; 18 Law J., Q. B. 104.

(*i*) *Ashley* v. *Harrison*, 1 Esp. 48.

(*k*) Dyer, 19 a.; Burrough, J., 10 Moore, 451.

(*l*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637. *Cook* v. *Batchellor*, 3 B. & P. 150; ante, p. 504; post, ch. 21.

lication can be justified or excused (*m*). But in the case of verbal slander, where the action is maintainable only in respect of some special damage that has accrued from the utterance of the slander, the action must, as we have seen, be brought against the person whose wrongful act is the direct and immediate cause of the special damage. If, therefore, the damage immediately results from the wrongful repetition of the slander by a person to whom it was communicated, it is the repeater, and not the original utterer of the scandal, who is responsible for the special damage that has arisen from it, and on which special damage alone the action is founded (*n*).

A corporation aggregate may be made answerable for a libel published by its directions, although the body corporate had no ill-will to the plaintiff, and did not mean to injure him, for great injustice would be suffered by individuals if their remedy for wrongs authorised by corporations aggregate were to be confined to the agents employed by them. Therefore, where the South-Eastern Railway Company falsely published through their electric telegraph that the Lewes Old Bank had stopped payment, it was held that the company was responsible in damages for the false and slanderous intelligence (*o*). Where the slander is made by two persons in a joint publication, such as an affidavit sworn by both, they may both be made defendants in one and the same action (*p*), but where slanderous words are spoken by two different persons, separate actions should be brought (*q*).

Declarations for libel and slander.—In every declaration for libel or slander, either by publication in writing or by words, the writing or the very words themselves must be set out on the face of the declaration, in order that it may be shown to the court that the words are capable of receiving the innuendo or interpretation put upon them, and of producing the injury which is charged to have resulted from them (*r*); and also that the defendant may know the certainty of the charge, and may be able to shape his defence either on the general issue or by plea of justification accordingly; and this defect is not cured by verdict (*s*). "Whenever the charge," observes Holroyd, J., "arises out of the publication of a written instrument, the invariable rule is, that the instrument itself must be set out in the declaration, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action; for it is clear, that when it can be shown distinctly what the instrument is upon

(*m*) *M'Pherson* v. *Daniels*, 10 B. & C. 273. *Tidman* v. *Ainslie*, 10 Exch. 63.

(*n*) *Ward* v. *Weeks*, *Parkins* v. *Scott*, ante, pp. 5, 707.

(*o*) *Whitfield* v. *S. E. R. Co.*, 1 Ell. Bl. & Ell. 121; 27 Law J., Q. B. 229.

(*p*) *Maitland* v. *Goldney*, 2 East, 426.

(*q*) *Chamberlain* v. *Goodwin*, Cro. Jac. 647. *Swithin* v. *Vincent*, 2 Wils. 227.

(*r*) *Gutsole* v. *Mathers*, 1 M. & W. 503.

(*s*) *Cook* v. *Cox*, 3 M. & S. 116.

which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment upon it. A defendant is not bound to put the question as a combined question of law and fact to the jury, but has a right to put it as a mere question of law to the court. The setting out only the substance and effect of the writing would not only deprive the defendant of that advantage, but also of his writ of error; and it would make the verdict of a jury binding in cases where it ought not to be so" (*t*).

In actions for slandering a man in his trade or profession, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but ought also to show in what manner it was connected by the speaker with that profession (*u*).

Of the innuendo or defamatory sense attributed to the writing or words on the face of the declaration.— By the statute 15 & 16 Vict. c. 76, s. 61, it is enacted, that in all actions for libel and slander the plaintiff shall be at liberty to aver in his declaration that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment, to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration is sufficient. The pleader, therefore, may put any construction he pleases upon the words, and it is for the jury to determine whether the construction is borne out by the evidence (*x*).

The forms of declaration in the schedule of the Common-law Procedure Act, 1852, merely set forth that "the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called, &c., the words following, that is to say, &c., meaning thereby," &c.; and, in cases of verbal slander, "that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, he is a thief, whereby the plaintiff lost his situation as, &c., in the employ of," &c. Where the words, whether written or spoken, are susceptible of a harmless, but also of an injurious meaning, the injurious meaning must be set out as well as the words, and their true import and signification may be established by evidence of the surrounding circumstances (*y*). When the words are libellous in themselves, no innuendo to explain their meaning is required (*z*); if they are incapable of the interpretation put upon them the declaration is bad, and the court will, if necessary, arrest the judgment. It is not necessary to allege formally that the defendant published

(*t*) *Wright* v. *Clements*, 3 B. & Ald. 509. *Wood* v. *Brown*, 6 Taunt. 169.

(*u*) *Ayre* v. *Craven*, 2 Ad. & E. 7. *James* v. *Brook*, 9 Q. B. 13.

(*x*) *Hemmings* v. *Gasson*, 1 Ell. Bl. & El. 346; 27 Law J., Q. B. 253.

(*y*) *Griffiths* v. *Lewis*, 8 Q. B. 851. *Gallwey* v. *Marshall*, 9 Exch. 294; 23 Law J., Exch. 78.

(*z*) *Barrett* v. *Long*, 3 H. L. C. 413.

the libel, it is sufficient if the circumstances set forth show that the libel was, in point of fact, published (*a*).

Statement of special damage in actions for verbal slander.— When the words themselves are not actionable without proof of special damage, the nature of the special damage must be particularized and set forth, in order that the defendant may be enabled to meet the charge. If, by reason of the speaking of the words, the plaintiff has lost the society of friends and neighbours, and the substantial benefits arising from their hospitality, this temporal damage should be particularized, and the names of the neighbours and friends who have refused to receive the plaintiff into their houses, and entertain him at dinner, &c. should be specified (*b*). Where a single woman brought an action against the defendant for saying she was with child, and had miscarried, in consequence of which she lost several suitors, it was held that she ought to have specified the names of these suitors, as they were necessarily within her knowledge (*c*). And where a tradesman complained of a loss of custom as a consequence of the slander, and must have known who his customers were whom he had lost, he was required to state their names on the face of his declaration (*d*). But if the declaration alleges the special damage with as much certainty as the subject-matter is capable of, it is now sufficient. Thus, where the declaration alleged that the plaintiff, before the speaking of the scandalous words by the defendant, was employed to preach to a dissenting congregation at a certain licensed chapel, and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they would otherwise have given him, it was held that it was not necessary to state the names of the persons who, in consequence of the slander, discontinued giving the plaintiff the emoluments, and that it was sufficient to show that, in consequence of the slander, he was removed from his office, and lost the emoluments of it (*e*). And in an action for slander of the plaintiff in his business of an innkeeper or eating-house keeper, it was held to be sufficient to allege and prove as special damage a general loss of custom from the slander, without stating the names of the customers who ceased to frequent the establishment, as the customers of an inn are travellers, and persons passing to and fro, and it might be impossible for the plaintiff to ascertain their names, or the reason why they ceased to frequent the house (*f*).

What may be given in evidence under the plea of Not guilty.— It is com-

(*a*) *Baldwin* v. *Elphinston*, 2 W. Bl. 1037.
(*b*) *Moore* v. *Meagher*, 1 Taunt. 39.
(*c*) *Barnes* v. *Prudlin*, 1 Sid. 396.
(*d*) *Fenn* v. *Dixe*, 1 Roll. Abr. 58.
(*e*) *Huntley* v. *Herring*, 8 T. R. 133.
(*f*) *Evans* v. *Harries*, 1 H. & N. 251; 26 Law J., Exch. 31.

petent to the defendant under the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows; as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant (*g*). The plea of NOT GUILTY puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. The fact, therefore, that a libellous publication was a privileged communication may be given in evidence under this plea. It does not follow that a defence may not be given in evidence under "Not guilty," because it might also form the subject of a special plea (*h*). In an action for slander of the plaintiff in his office, profession, or trade, the plea of NOT GUILTY will operate in denial of speaking the words, or speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged (*i*). It puts in issue the infliction of the wrong in the mode described, and the special damage, where that is substantially the thing complained of.

When the substance of the charge in the declaration is, that the defendant has inflicted injury upon the plaintiff by the speaking of disparaging words, not actionable in themselves, but forming a ground of action, by reason of special damage having arisen from the utterance of them, the plea of Not guilty puts in issue all the facts creating the special damage; for without those facts, and without the special damage, there is no wrong of which the plaintiff has any reason to complain (*k*). Where the words are actionable themselves without special damage, a traverse of the allegation of the special damage is immaterial and unnecessary. In such a case, if the plaintiff proves his special damage he will recover it; if he fails in proving it, he may still resort to and recover his general damages. A finding upon it, therefore, one way or the other, will have no effect as to the right to the verdict (*l*). A plea to the damage only is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained (*m*).

If a shareholder in a public company has published letters or writings imputing insolvency to the company, he may, under the plea of Not guilty, show that he was actuated by a desire to protect the interests of the shareholders, and had reasonable ground for making the imputation (*n*).

(*g*) Littledale, J., 10 B. & C. 272.

(*h*) *Lillie* v. *Price*, 5 Ad. & E. 645. *Hoare* v. *Silverlock*, 9 C. B. 28. *Lewis* v. *Levy*, 27 Law J., Q. B. 287.

(*i*) Reg. Gen. 10 Vict.; 1 Ell. & Bl. App. lxxxi.

(*k*) *Wilby* v. *Elston*, 8 C. B. 149. *Norton* v. *Scholefield*, 9 M. & W. 665.

(*l*) *Smith* v. *Thomas*, 2 Sc. 546; 2 Bing. N. C 372. *Wyatt* v. *Gore*, Holt, N. P. C. n.

(*m*) *Robinson* v. *Marchant*, 7 Q. B. 918.

(*n*) *Metrop. Saloon Om. Co.* v. *Hawkins*, 4 H. & N. 151; 28 Law J., Exch. 201.

Plea that the libel was inserted without malice or gross negligence, and that an apology was published — Payment of money into court. — By 6 & 7 Vict. c. 96, s. 2, it is enacted, that in any action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that the libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper, or other periodical publication, a full apology for the libel; or if the newspaper or periodical publication is published at intervals exceeding a week, that he had offered to publish the apology in any newspaper or periodical publication, to be selected by the plaintiff; and that every defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained (*o*). To entitle the defendant to the benefit of an apology under this statute, the apology should be printed in such a part of the paper, and in such a type, as will be likely to ensure its perusal by the persons who read the libel, or by all who read the paper (*p*).

When the general issue is pleaded, and also a plea denying actual malice, and stating the publication of an apology set forth in the plea, the publication of previous libels on the plaintiff by the defendant is admissible in evidence, to show that the defendant wrote the libel in question with actual malice. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of the libel in question, merely affects the weight, not the admissibility, of the evidence (*q*).

Pleas of justification. — To enable the plaintiff to give the truth of the charge or imputation in evidence as a defence to the action, the defendant must plead a plea of justification, alleging that the plaintiff did the act imputed to him by the libel, and that the defendant therefore published or spoke the words of which the plaintiff complains (*r*). Every plea of justification must meet and justify the charge or complaint set out on the face of the declaration. If it does not do this, reasonably and substantially, it is a nullity (*s*). It must also, where the libel is in writing, justify everything contained in the libel which is injurious to the plaintiff.

(*o*) The special plea of apology and payment into court cannot be pleaded along with Not guilty to the same part of the declaration. *O'Brien* v. *Clement*, 15 M. & W. 435.

(*p*) *Lafone* v. *Smith*, 7 W. R. 13.

(*q*) *Barrett* v. *Long*, 3 H. L. C. 414.

(*r*) *Smith* v. *Richardson*, Willes, 20.

(*s*) *Tighe* v. *Cooper*, 7 Ell. & Bl. 639; 26 Law J., Q. B. 215. *Wyatt* v. *Gore*, Holt, N. P. C. n.

If it imputes to the latter that he has been guilty of some act that is discreditable to him as a gentleman, as well as of a criminal offence, the plea of justification must cover the whole charge (*t*). But if the libel contains several charges, the defendant may justify some of them, and plead Not guilty as to others (*u*). A plea of justification, imputing general misconduct to the plaintiff, and giving no specific instances of it, was formerly held bad on special demurrer (*x*). A defendant, for example, was not at liberty to charge a plaintiff with swindling, without showing any special instances of it on the record, that the plaintiff might come prepared to meet them (*y*).

Where a defendant justifies words which amount to a charge of felony, and proves his justification, and obtains a verdict, the plaintiff may afterwards be put upon his trial for the felony by that verdict without the intervention of a grand jury (*z*).

The publication and dissemination of written or printed slander cannot be justified, as we have seen, on the ground that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true (*a*).

Evidence for the plaintiff—Proof of the publication of a libel.—If a man writes a libel, and puts it into his desk, this is no publication of it; but if a libellous paper or placard has been notoriously circulated or posted up in places of public resort, proof of a paper in the defendant's handwriting, corresponding with the libellous placard, will be *primâ facie* evidence against him of his being the author of the libel, and render it necessary for him to explain the matter (*b*). A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased, and are omitted in the newspaper, provided the passages erased do not qualify the libel (*c*). If the libel on which the action is founded contains any marked peculiarities in spelling, style, or composition, letters of the defendant concerning the plaintiff containing similar peculiarities are admissible in evidence, to show that the defendant was the writer of the libel (*d*).

(*t*) *Helsham* v. *Blackwood*, 11 C. B. 128. *Mountney* v. *Watton*, 2 B. & Ad. 673.

(*u*) *M'Gregor* v. *Gregory*, 11 M. & W. 287.

(*x*) *Hickinbotham* v. *Leech*, 10 M. & W. 361. *O'Brien* v. *Clement*, 16 ib. 105.

(*y*) Buller, J., *Janson* v. *Stuart*, 1 T. R. 753; 1 Smith's L. C. 4th edn. 50–61.

(*z*) Ld. Kenyon, *Cook* v. *Field*, 3 Esp. 134.

(*a*) *Tidman* v. *Ainslie*, 10 Exch. 63. *M'Pherson* v. *Daniels*, 10 B. & C. 273, overruling the 4th resolution in *Ld. Northampton's* case, 12 Rep. 134; ante, p. 680.

(*b*) *Rex* v. *Beare*, 1 Ld. Raym. 417. *Lamb's* case, 9 Co. 59 b. *Rex* v. *Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

(*c*) *Tarpley* v. *Blabey*, 2 Bing. N. C. 437.

(*d*) *Brookes* v. *Titchborne*, 5 Exch. 929.

Where a defendant, who had a copy of a libellous caricature in his house, showed it to another on being requested so to do, Lord Ellenborough ruled that this was not sufficient evidence of publication to support an action (*e*).

Libellous matter contained in a private letter addressed to the plaintiff himself, and only delivered into his own hands, is not such a publication of a libel as will support an action (*f*). But where it was proved that the defendant addressed a libellous letter to the plaintiff, knowing that the plaintiff's clerk, in the absence of the plaintiff, was in the habit of opening the plaintiff's letters, and the letter was, in point of fact, received and opened by the clerk before it reached the plaintiff's hands, Lord Ellenborough held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk into possession of the letter, and that if he did, there would be a publication of its libellous contents (*g*). The sending of a letter to a wife containing libellous charges against her husband is a sufficient publication of the libel; for, to injure "a man's character with his wife," or to assail his honour by communications made to her, is to do him a grievous wrong (*h*).

If a letter is sent by post, it is *primâ facie* evidence that the party to whom it was addressed received it in due course (*i*).

Where the defendant's daughter had been employed by him to make out his bills and write letters for him on matters of business, and the daughter wrote and published a libel upon the plaintiff in her father's (the defendant's) name, it was held that this was not sufficient to fix him with the authorship of the libel; for the principal is only responsible for the acts of his agent within the limits of the authority delegated to the agent, and that it did not follow, from a daughter being employed to make out bills and write letters for her father for the purpose of conducting his business, that she was authorised by him to write a libel; and that there ought to be some evidence to show that the libel was written either by the command, or with the knowledge, of the defendant (*k*). But if a man request another generally to write a libel, he is answerable for the libel written pursuant to his request, and must take his chance of what appears. He is responsible, though something may be added which he did not state (*l*).

Publication in newspapers.—Every sale of a newspaper to a party sent to purchase it is a fresh publication, and, therefore, where an action was brought in respect of a libel in a newspaper, published seventeen years before the action, and the Statute of Limitations was pleaded,

(*e*) *Smith* v. *Wood*, 3 Campb. 323.
(*f*) *Phillips* v. *Jansen*, 1 Esp. 625. *Peacock* v. *Reynal*, 2 Brownl. 151.
(*g*) *Delacroix* v. *Thevenot*, 2 Stark. 63.
(*h*) *Wenman* v. *Ash*, 13 C. B. 842; 22 Law J., C. P. 190.
(*i*) *Warren* v. *Warren*, 1 Cr. M. & R. 250.
(*k*) *Harding* v. *Greening*, 1 Moore, 479.
(*l*) *Rex* v. *Cooper*, 8 Q. B. 536.

it was held that the plea was negatived by proof that a copy of the paper had been purchased from the defendant by the plaintiff's servant, sent to obtain it, within the six years. And where the proof of publication relied on was the sale of a copy of a newspaper to a messenger sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff, it was held that this was a sufficient publication to sustain an action for damages; for a defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to such stranger, though he may have been sent for the work by the plaintiff himself (*m*).

If a man wraps up a newspaper, and sends it into another county by a boy, the man who sends the paper is the publisher of it, and not the boy, who is ignorant of the contents of the paper, and is an innocent agent in the transaction (*n*).

Proof of the delivery, by order of the defendant, of a copy of a newspaper to the officer at the Stamp Office, is proof of publication (*o*).

Proprietorship of newspapers containing libels.—Before any newspaper can be lawfully printed and published, a declaration in writing must be delivered (6 & 7 Wm. 4, c. 76), to the Stamp Office, or the proper officer for stamps in the district within which the newspaper is intended to be published, setting forth the correct title of the newspaper, a true description of the building wherein it is intended to be printed and published, the true name, addition, and place of abode of the printer, publisher, and proprietor, or two out of several proprietors. This declaration must be signed (s. 6) by every person named therein as printer or publisher, and must be renewed to meet changes and alterations in the proprietorship, or in the persons printing or publishing the paper. These declarations are to be filed and kept by the Commissioners of Stamps and Taxes, and certified copies of them are to be admitted (s. 8) in civil and criminal proceedings, touching any newspaper mentioned in any such declaration, and touching any publication or matter contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration, as are required to be therein set forth, and of their continuance in the same condition against every person who shall have signed such declaration, unless it shall be proved that such person had become lunatic, or that previous to the publication in question he had signed and delivered to the proper officer a declaration that he had ceased to be printer, publisher, or proprietor, or that a new declaration, in which he did not join, had been made and delivered to the proper authorities.

Provision is made for the issue of certified copies of these declarations,

(*m*) *Duke of Brunswick* v. *Harmer*, 1 Q. B. 189.

(*n*) Best, J., *Rex* v. *Burdett*, 4 B. & Ald. 126.

(*o*) *Rex* v. *Amphlit*, 4 B. & C. 35.

and it is enacted (s. 8), that in all proceedings a copy, certified to be a true copy, under the hand of the commissioner or officer described in the act, shall be received in evidence against every person named in the declaration, as a person making or signing the same, as sufficient proof of such declaration, and of the contents thereof; and that the same was duly signed and made according to the act. And whenever a certified copy has been produced in evidence against a person who has signed and made such declaration, and a newspaper shall afterwards be produced in evidence, intituled in the same manner as the newspaper mentioned in such declaration, and having the name of the printer and publisher and the place of printing the same, or purporting to be the same as in the declaration, though not in the same form, it shall not be necessary for the plaintiff, in any action or other proceeding, to prove that the newspaper was purchased of the defendant, or at any house, shop, or office belonging to, or occupied by him, his servants, or workmen (*p*).

If a mortgagee of shares in a newspaper, to protect his own interests, takes the precaution of registering himself "as legal owner as mortgagee," and the mortgagor registers himself as owner of the equity of redemption, both are liable as proprietors (*q*).

Proof of the utterance of the words charged in actions for verbal slander.—The plaintiff need not prove all the words laid in the declaration, but he must prove so much of the very words alleged to have been spoken as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander (*r*); but if the words proved in evidence convey substantially the same imputation, and the only difference is that the same thing is expressed in a different form of words, or is proved to have been done in a different way from that charged in the declaration, the variance may be amended at the trial (*s*). If words alleged to have been spoken affirmatively were only put interrogatively, or if they convey quite a different imputation from that charged in the declaration (*t*), the defect cannot be amended.

A defendant who is sued for verbal slander is responsible only, as we have seen, for what he himself has uttered. He cannot be made liable in damages for an unauthorised repetition of the slander by a party to whom he originally communicated it, such a communication not being the necessary consequence of the original uttering of the slanderous words (*u*).

Proof of the singing of libellous songs.—Where a libellous song was

(*p*) *Mayne* v. *Fletcher*, 9 B. & C. 385.
(*q*) *Brunswick* v. *Harmer*, 3 C. & K. 12. *Baker* v. *Wilkinson*, Car. & M. 401.
(*r*) *Maitland* v. *Goldney*, 2 East, 437. *Orpwood* v. *Barkes*, 4 Bing. 263.
(*s*) Post, ch. 21, s. 1. AMENDMENT.
(*t*) *Barnes* v. *Holloway*, 8 T. R. 150. *Bell* v. *Byrne*, 13 East, 563. *Walters* v. *Mace*, 2 B. & Ald. 756. *Cartwright* v. *Wright*, 5 B. & Ald. 616. *Brooks* v. *Blanshard*, 1 Cr. & M. 791.
(*u*) *Ward* v. *Weeks*, *Parkins* v. *Scott*, ante, p. 707.

sung in the streets from a printed paper, which had been destroyed, the singer of the song was allowed to prove that a paper produced was an exact copy of the song that was sung (*x*). Where a number of placards are printed by order of the defendant, no one of the printed papers is an original more than the rest. When they are printed they all become originals, and the manuscript is discharged (*y*).

Application of the libel to the plaintiff.—If the libellous words point to no person in particular, it becomes a question of evidence whether they do or do not apply to the plaintiff (*z*). If the name of the party libelled is left in blank, or is designated by asterisks, evidence may be given to show who was meant. "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant" (*a*). Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before a jury, and the jurors are to determine whether, when a class is referred to, the slander was pointed at the plaintiff (*b*).

Where it appears, from the matter complained of, that there was not any intention of libelling any particular individual, but that the imputations intended to be conveyed were meant to be cast upon the public authorities, or some one of several public functionaries, the plaintiff cannot recover (*c*).

Proof of the defamatory sense of the words used.—It must appear to the court, from the words set out in the declaration, that they are capable of conveying or bearing the defamatory meaning assigned to them; and if so, it is for the jury to determine whether, in point of fact, the construction put upon the words by the plaintiff is borne out by the evidence (*d*). When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libellous and not in a harmless sense. If the plaintiff attributes to them a much wider and more extensive meaning than they fairly warrant, or the words do not fairly bear the meaning imputed to them, the defendant will be entitled to a verdict (*e*), unless the words are manifestly libellous as they stand, and require no meaning to be assigned to them; in which case the meaning assigned to them by the plaintiff may be rejected as surplusage (*f*). An insensible or repugnant meaning may be rejected as surplusage on

(*x*) *Johnson* v. *Hudson*, 7 Ad. & E. 233, n.
(*y*) *Rex* v. *Watson*, 2 Stark. 130.
(*z*) *Merywether* v. *Turner*, 19 Law J., C. P. 10.
(*a*) *Bourke* v. *Warren*, 2 C. & P. 310.
(*b*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637.
(*c*) *Solomon* v. *Lawson*, 8 Q. B. 823.
(*d*) *Solomon* v. *Lawson*, ut sup. *Hemmings* v. *Gasson*, ante, p. 715. *Homer* v. *Taunton*, 5 H. & N. 663; 29 Law J., Exch. 318.
(*e*) *Broome* v. *Gosden*, 1 C. B. 732. *Williams* v. *Gardiner*, 1 M. & W. 249.
(*f*) *Harvey* v. *French*, 1 Cr. & M. 11. *Roberts* v. *Camden*, 9 East, 92.

demurrer, or on motion in arrest of judgment; but a plaintiff who has by his declaration assigned a particular meaning to equivocal words, which are not necessarily slanderous, and fails to establish that meaning by his evidence, cannot reject the meaning he has himself adopted, and resort to another interpretation of the words (*g*).

Where the words used have an equivocal meaning, but are well understood and known in a libellous sense, it is for a jury to say whether they were used in that sense or not (*h*). "We ought to attribute," observes Coleridge, J., "to a jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used." The term "frozen snake," has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If, therefore, a publication imputes to a person that his friends, who have been assisting him, have realised in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors, and if they do they are actionable (*i*).

If the meaning is so obscure and doubtful as to render the document incomprehensible, it is not actionable, although the plaintiff's name may be mentioned therein in an impertinent manner, and the publication may have been evidently intended to vex and annoy him (*k*).

In an action for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to show that they were not intended to give the idea which their ordinary and primary meaning would give (*l*). If the words themselves are not of a defamatory character, they are not actionable, although special damage may have resulted to the plaintiff from the utterance of them. There is no ground for presuming malice from the utterance of words innocent in themselves, and a jury cannot infer it. Thus where the plaintiff, a serving-maid and shopwoman, alleged in her declaration that the defendant maliciously spoke these words concerning her,—"She (the plaintiff) secreted 1*s.* 6*d.* under the till, stating that these are not times to be robbed;" and that by reason of the speaking of these words by the defendant she had been refused a situation, it was held that, as the words did not of necessity import anything injurious to the plaintiff's character,

(*g*) *Williams* v. *Stott*, 1 Cr. & M. 689. *Smith* v. *Carey*, 3 Campb. 461. *Sellers* v. *Till*, 4 B. & C. 655.

(*h*) *Wakley* v. *Healey*, 7 C. B. 605. *Baboneau* v. *Farrell*, 15 C. B. 360. *Greville* v. *Chapman*, 5 Q. B. 745.

(*i*) *Hoare* v. *Silverlock*, 12 Q. B. 624.

(*k*) *Capel* v. *Jones*, 4 C. B. 263.

(*l*) *Shipley* v. *Todhunter*, 7 C. & P. 680.

they were not capable of sustaining an action, although they had been followed by special damage. "It is said," observes Patteson, J., "that the words are actionable because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory" (*m*).

Admissibility of evidence of surrounding circumstances to explain and point the libel — Interpretation of the words used. — The ordinary popular sense of the writing, language, or words alleged to be libellous or defamatory, is to be taken to be the meaning of the printer, publisher, or speaker of them (ante, p. 711); but a foundation may be laid for showing another and different meaning. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word, which ordinarily or popularly is used in one sense, may, from something that has gone before, have a meaning different from its usual meaning. When, therefore, it is wished to get rid of the ordinary meaning, the witness must be asked if there was anything to prevent those words from conveying the meaning they ordinarily would convey; and if evidence is given, and a foundation laid for it, then the further question may be put, "What did you understand by them?" (*n*). It must first be shown that the word is used in, and has acquired, a peculiar sense, and then a witness may be asked whether he understood it in that sense. The phrase "lame duck," would be actionable if applied to a person on the Stock Exchange, because there it has acquired a particular meaning, which could be shown. So of the word "black sheep," as applied to an attorney; so of the word "blackleg," if it can be shown that it had acquired a similar signification as applied to gamesters (*o*).

Words spoken at different times may be given in evidence for the purpose of making out the charge laid in the declaration, or to prove the animus of the defendant; but if they in themselves constitute so many different libels, giving rise to separate and distinct causes of action, the jury must be cautioned not to give damages in respect of them.

The defendant has a right to have the whole of the publication read, in order that the meaning of particular passages may be illustrated and explained by the context of the whole writing (*p*). And in an action for oral slander, he is entitled to have the whole conversation of which the slanderous words formed part given in evidence, in order to explain the meaning of particular expressions, and to show that they did not convey the imputation sought to be fastened upon them.

(*m*) *Kelly* v. *Partington*, 5 B. & Ad. 651.

(*n*) *Daines* v. *Hartley*, 3 Exch. 205.

(*o*) Watson, B., *Barnett* v. *Allen*, 3 H. & N. 381; 27 Law J., Exch. 415.

(*p*) *Cooke* v. *Hughes*, R. & M. 115.

Proof of subsequent libels to explain and point the libel charged in the declaration may be given, but if the evidence is offered for the mere purpose of swelling the damages it will be rejected. "The distinction," observes Lord Abinger, "is, you may give evidence of subsequent words to explain the words in the declaration: but when there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this" (*q*).

Proof of successive libels to show malice.—As the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff, evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action; but whenever the evidence given does disclose another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected (*r*). Defamatory statements, therefore, made by the defendant subsequently to the publication of the libel, are admissible in evidence merely to show malice; but if any considerable distance of time has elapsed between the publication of the libel and the speaking of the words, they ought to be received with very great caution, as they may refer to something that has taken place between the plaintiff and the defendant subsequently to the libel, and may not, therefore, amount to any proof of malice at the time of the publication of the libel (*s*). And when such statements are given in evidence, the defendant is entitled to get rid of the effect of them by proving the truth of the words (*t*).

Evidence of malice.—To sustain an action for a libel or for slander, the plaintiff must show that it was malicious; but every unauthorised publication of defamatory matter is, as we have seen, in point of law to be considered malicious, and it is a question of law whether the communication is authorised or not. If it be authorised, the legal presumption of malice arising from the unauthorised publication of defamatory matter fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact (*u*). Whenever one man is proved to have used words imputing the commission of felony, or of any other

(*q*) *Pearce* v. *Ornsby*, 1 Mood. & Rob. 456.

(*r*) *Pearson* v. *Le Maitre*, 5 M. & Gr. 720; 6 Sc. N. R. 607. *Barwell* v. *Adkins*, 1 ib. 808. *Darby* v. *Ouseley*, 1 H. & N. 1a.

(*s*) *Hemmings* v. *Gasson*, 1 Ell. Bl. & Ell. 346; 27 Law J., Q. B. 252.

(*t*) *Warne* v. *Chadwell*, 2 Stark. 457.

(*u*) Cresswell, J., *Coxhead* v. *Richards*, 2 C. B. 605.

indictable offence to another, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant, making a charge to a constable, &c. The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration by a jury, as proving malice and aggravating the injury, and every other part of the defendant's conduct down to the time of the trial may be considered by the jury; for acts, although subsequent, may indicate the existence of motives at a former time (*v*).

Proof of injury to the plaintiff.—To enable the plaintiff to maintain an action, and recover damages for the writing or publication of a libel, it must be shown, as we have seen, that the plaintiff is the person to whom the injury from the libel immediately accrues. If the injury is too remote, and not to be connected with the publication of the libel, the plaintiff will be nonsuited (ante, pp. 706, 713). If the tendency of the publication is injurious to the plaintiff, the law will presume that the defendant, by the act of publishing it, intended to produce the injury it was calculated to effect, and it is the duty of a judge, if he thinks the publication injurious to the plaintiff, to tell the jury it is a libel and actionable (*x*). Every person who publishes in writing matter injurious to the character of another, is considered in point of law to have intended the consequences resulting from that act (*y*).

Evidence of special damage.—When proof of special damage is essential to the maintenance of the action (ante, p. 700), it must be proved as laid, and any substantial variance between the allegation and the proof will be ground of nonsuit. It must appear also to be the natural and necessary result of the speaking of the words, or it will fail to sustain the action. If there are two distinct causes of special damage, one proceeding from the act of the defendant and another from the act of a third party, and the special damage may have resulted from either, it will fail to support an action (*z*). If the declaration alleges as special damage that several named persons had ceased to have dealings with the plaintiff in the way of his trade, the persons themselves must be called to prove the fact (*a*).

Proof of the trade, or profession, or official character of the plaintiff.—Where the libel imputes to the plaintiff misconduct in his practice of a physician, or surgeon, or an attorney, not doubting or denying his qualification to practise, it will not be necessary to do more than prove that the plaintiff was acting in the particular professional capacity imputed to him at the time of the publication of the libel (*b*). But when the libel or

(*v*) *Simpson* v. *Robinson*, 12 Q. B. 513.
(*x*) *Haire* v. *Wilson*, 9 B. & C. 645.
(*y*) *Fisher* v. *Clement*, 10 B. & C. 475.
(*z*) *Vicars* v. *Wilcocks*, 8 East, 2.
(*a*) *Tilk* v. *Parsons*, 2 C. & P. 202. *Tunnicliffe* v. *Moss*, 3 C. & K. 83.
(*b*) *Berryman* v. *Wise*, 4 T. R. 366. *Smith* v. *Taylor*, 1 N. R. (B. & P.) 204. *Rutherford* v. *Evans*, 6 Bing. 451.

slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is denied, the plaintiff must be prepared to prove it, by producing his diploma or certificate, duly sealed or signed, and stamped, where a stamp is requisite. If the document is not admissible in evidence on its production under the Documentary Evidence Act (*c*), the signatures must be proved in the ordinary way.

Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.—In order to recover damages for slanderous words spoken of a tradesman or professional man in his trade or profession, it must be shown how the words were connected with his profession. To impute immorality to a clerk of a gas company, to say that he "consorts with whores," is "a disgrace to the town," and "unfit to hold his situation," is not actionable, because they are not connected with his character and conduct as a clerk. He may be a very good clerk, well fitted for his duties, although he is scandalously immoral (*d*).

Evidence on the part of the defendant — Traverse of material allegations. —If the libel contains a charge upon a man in the way of his trade or business, the allegation concerning such trade or business must, if traversed, be strictly proved as it is set forth in the declaration, and the defendant is at liberty to bring evidence to disprove it; notwithstanding the disproving of the allegation does in effect prove the truth of the libel. If the plaintiff in his declaration alleges that he was, at the time of the publication of the libel, the manufacturer of a particular article, which he supplied to his customers in the way of his trade, and the defendant traverses the allegation, and the plaintiff establishes a *primâ facie* case, the defendant is entitled to prove that the plaintiff did not manufacture the particular article he pretended to make, but a composition of a very different description, although the evidence amounts to proof of the truth of the charge imputed by the libel, and there is no plea of justification on the record (*e*).

Proof of the truth of the charge or accusation.—If the defendant can show that the defamatory charge or accusation made by him against the plaintiff is true in substance, he answers the claim for damages. But to enable him to give the truth in evidence, in answer to the action, there must be a plea of justification on the record (*f*). The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages, for the law will not permit a

(*c*) 8 & 9 Vict. c. 113; post, ch. 21; 14 & 15 Vict. c. 99, s. 8.
(*d*) *Lumby* v. *Allday*, 1 Cr. & Jerv. 301.
(*e*) *Manning* v. *Clement*, 7 Bing. 368.
(*f*) *O'Brien* v. *Bryant*, 16 M. & W. 168. *Edsall* v. *Russell*, 5 Sc. N. R. 801.

man to recover damages in respect of an injury to character which he either does not, or ought not, to possess (*g*).

Where the defendant justifies words which impute a felony to the plaintiff, it is competent to him to go into proof of his justification, although the plaintiff has been tried and acquitted of the charge, the trial and acquittal being *res inter alios acta* (*h*). If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man be adjudged by the sessions to be the father of a bastard child, the adjudication is an answer to any complaint made by him, in the spiritual court or elsewhere, against any one for saying or publishing that he has had a bastard (*i*). When the plaintiff has not been actually convicted of the felony he must be tried by the jury on the plea of justification, in the same way as if he was on his trial upon an indictment for the offence in a criminal court; so that, if there is a doubt of his guilt, the jury are bound to give him the benefit of the doubt (*k*).

If a party publishes a libel and then pleads a justification, the court will not assist him to obtain evidence in support of his plea (*l*).

Proof of privileged communications.—Proof of the libel or slander having been published or uttered in the course of legal proceedings, is *primâ facie* evidence that it was published or uttered under the sanction and protection of a court of competent authority (ante, p. 684). If it is shown to have been published in a petition or complaint to parliament, or to the Queen, or her ministers, containing a temperate statement of a grievance calling for inquiry and redress, this will be *primâ facie* evidence that it was published for sufficient cause and upon proper motives. If it is shown to have been a private communication between friends, it must be proved to have related to matters of family or pecuniary interest, directly affecting the writer of the communication (ante, p. 690).

The damages recoverable in actions for defamation will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case. Where an action was brought for slanderous words, imputing subornation of perjury to the plaintiff, and the defendant suffered judgment by default, and on the execution of a writ of inquiry of damages the plaintiff gave no evidence of any actual damage, but his counsel addressed the jury, who assessed the damages at 40*l.*, and the defendant then moved to set aside the inquisition on the ground that nominal damages only were recoverable in the absence of any proof of damage on the part of the plaintiff,

(*g*) Littledale, J., 10 B. & C. 272.

(*h*) *England* v. *Bourke*, 3 Esp. 80. *Cook* v. *Field*, ib. 134.

(*i*) *Thornton* v. *Pickering*, 1 Freem. 283. *Webb* v. *Cook*, Cro. Jac. 535. *Rex* v. *Ridlip*, 1 Ld. Raym. 394. Jervis, C. J., *Helsham* v. *Blackwood*, 11 C. B. 128.

(*k*) *Richards* v. *Turner*, Car. & M. 417.

(*l*) *Metrop. Saloon Om. Co.* v. *Hawkins*, 4 H. & N. 151.

it was held that the plaintiff was not bound to give any such evidence (*m*). If the defendant had any ground to urge in mitigation of damages, he should have proved it before the sheriff's jury.

The jury may give to the plaintiff damages for the publication of the libel and for the mental suffering arising from the apprehension of the consequences of the publication (*n*). The damages are almost altogether in the discretion of the jury. The court will not interfere with them unless they are shown to be manifestly outrageous and extravagant (*o*).

Evidence in aggravation of damages cannot, as we have seen, be given, if it establishes another cause of action against the plaintiff; for, if that were permitted, the jury would be giving damages for a second libel in an action for the first (*p*). Although a plea of justification, imputing felony to the plaintiff, is abandoned at the trial and apologized for, still, the putting of such a plea upon the record and failing to prove it is evidence of malice, and a great aggravation of the defendant's conduct, as showing an animus of persevering in the charge to the very last. The putting of such a plea upon the record, therefore, is a matter proper to be taken into account by the jury in estimating the amount of damages (*q*).

Mitigation of damages.—A defendant is not now allowed to give evidence of the truth of the defamatory charge or statement in mitigation of damages (*r*), but must, if he wishes to rely upon it in any way, put a plea of justification on the record. But where the plaintiff, by his declaration, alleges that before the publication of the libel he had always preserved a good character in society, from which he has been driven by the insinuations in the libel, and claims damages accordingly, evidence is admissible to show that, prior to the publication of the libel, the plaintiff's character was so bad that he was universally avoided and shunned (*s*); for, whenever a person claims damages on the ground of disparagement to his character, it may be shown by evidence that his character was blemished prior to the utterance of the slander of which he now complains (*t*).

Evidence of this sort must, however, be used with extreme caution, or it will tend to the aggravation rather than the mitigation of the damages. If the circumstances amount to a justification of the libel, they are not then receivable in mitigation of damages, as they should have been pleaded by way of justification if the defendant meant to rely upon them (*u*). In

(*m*) *Tripp* v. *Thomas*, 3 B. & C. 427.
(*n*) *Goslin* v. *Corry*, 8 Sc. N. R. 25.
(*o*) *Gilbert* v. *Burtenshaw*, Cowp. 230. *Highmore* v. *Earl of Harrington*, 3 C. B. N. S. 142. *Harrison* v. *Pearce*, 32 Law T. R. 298.
(*p*) Ante, p. 726. *Finnerty* v. *Tipper*, 2 Campb. 74.
(*q*) *Warwick* v. *Foulkes*, 12 M. & W. 508.
(*r*) *Underwood* v. *Parks*, 2 Str. 1200.
(*s*) *Earl of Leicester* v. *Walter*, 2 Campb. 251.
(*t*) Ld. Ellenborough, C. J., —— v. *Moor*, 1 M. & S. 286.
(*u*) *Watson* v. *Christie*, 2 B. & P. 224; post, ch. 22, s. 1.

some cases, general evidence of the plaintiff's bad character has been held to be inadmissible by way of mitigation of damages (*x*). In other cases, the defendant has been allowed to prove, by cross-examination of the plaintiff's witnesses, that rumours and reports of the same tenor as the libel were current prior to the publication of the libel, and were the common topics of conversation (*y*). Rumours current *after* the utterance of slander cannot, of course, help the defence, as they are the natural result of the dissemination of the slander, and tend only to aggravate the damages (*z*).

It is no ground for mitigation of damages that the defendant, at the time he uttered the slander, stated that he heard it from another person, naming such person (*a*).

Proof of libels by the plaintiff on the defendant.—"If a man is in the habit of libelling others, he complains," observes Sir James Mansfield, "with a very bad grace of being libelled himself; and if two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side" (*b*). But the defendant cannot give in evidence, in mitigation of damages, other libels published concerning him, unless the defendant can show that the libels proceeding from the plaintiff were connected with the libels proceeding from the defendant, for one libel cannot be set off against another, unless it can be shown that they are connected together, and that the libel published by the plaintiff provoked the libel published by the defendant, and that the plaintiff is himself, to a certain extent, the cause of the injury for which he claims compensation in damages (*c*). When the object is to show that the defendant was provoked, by libels published against him by the plaintiff, to retaliate by publishing the libel of which the plaintiff complains, it is essential to prove that the plaintiff's libels came to the defendant's knowledge before he published his libel (*d*).

Evidence of offers of apology in mitigation of damages.—By 6 & 7 Vict. c. 96, s. 1, it is enacted, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention, given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before there was an opportunity of offering an apology (ante, p. 718).

(*x*) *Jones* v. *Stevens*, 11 Pr. 265.
(*y*) *Wyatt* v. *Gore*, Holt, N. P. C. 306. *Richards* v. *Richards*, 2 Mood. & Rob. 557.
(*z*) *Thompson* v. *Nye*, 20 Law J., Q. B. 85; 16 Q. B. 175.
(*a*) *Bennett* v. *Bennett*, 6 C. & P. 588; ante, p. 719.
(*b*) *Finnerty* v. *Tipper*, 2 Campb. 72.
(*c*) *May* v. *Brown*, 3 B. & C. 126. *Tarpley* v. *Blabey*, 2 Bing. N. C. 441.
(*d*) *Watts* v. *Fraser*, 7 Ad. & E. 232.

Of the judge's direction to the jury.—The stat. 32 Geo. 3, c. 60, s. 1, enacts, that on trials for libel the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same. Also (s. 2) that the judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue (*e*). The usual course in cases of libel since the passing of this statute is, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and that whether the libel is the subject of a criminal prosecution or a civil action. The judge, as a matter of advice to them in deciding the question, may give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law (*f*). "The cases," observes Lord Denman, "show that a judge must not leave the fact of the defendant's intention as a question for the jury (*g*), except so far as the intention may be shown by the tendency of the publication itself. A man may wilfully publish a mischievous libel without intending to injure the party, and may be responsible. He may, indeed, in effect do him no harm by the publication; for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication" (*h*).

It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning (*i*).

Where the defendant sets up as a defence that the communication was a privileged communication, but the judge holds that there are comments by the defendant in excess of the privilege, the judge is not thereby justified in telling the jury that the defendant, by exceeding his privilege, has been guilty of a libel, for whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed, by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. Whenever there are expressions in a publication which may reasonably be contended to prove malice, the plaintiff has a right to have the whole matter submitted to the jury, for them to say whether, in writing and publishing it, the defendant was acting *bonâ fide* or maliciously (*k*).

Arrest of judgment after verdict.—If the judge and jury think the pub-

(*e*) *Baylis* v. *Lawrence*, 11 Ad. & E. 924.

(*f*) *Parmiter* v. *Coupland*, 6 M. & W. 108. *Rex* v. *Watson*, 2 T. R. 206.

(*g*) *Haire* v. *Wilson*, 9 B. & C. 645.

(*h*) *Baylis* v. *Lawrence*, 11 Ad. & E. 924.

(*i*) *Sturt* v. *Blagg*, 10 Q. B. 908.

(*k*) *Cooke* v. *Wildes*, 5 Ell. & Bl. 342; 25 Law J., Q. B. 367.

lication libellous, still if on the record it appears not to be so, judgment must be arrested (*l*). If an action be brought for speaking slanderous words all at one time, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet if any of the words will, the damages may be given generally; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. But if the action be brought for several slanders spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another, and a verdict be found for all the words, and entire damages given, the judgment will, it seems, be arrested (*m*). If the words appear, upon the face of the declaration, to have been spoken at one time, the whole may be considered as one count, containing words actionable and not actionable, and the verdict will stand upon those which are actionable (*n*).

Indictments for libel and slander.—Malicious defamation either in printing or writing, or by signs and pictures, and, in certain cases, by word of mouth, has always been considered an indictable offence at common law (*o*), as tending to promote strife, and quarrels, and breaches of the peace by inciting persons to revenge themselves for the affront, or for the preservation of their good name. A libel upon a magistrate, or public officer in the execution of his public duty, has also always been considered a great public offence, as it tends to bring the administration of justice and the government itself into contempt.

Although the person libelled be dead at the time of the publication of the libel, yet it is punishable if its tendency is to stir up others of the same family or society to break the peace in vindication of the memory of the deceased, or if it be a libel upon a magistrate or public officer (*p*).

A person may be indicted and punished criminally, not only for the publication of scandalous writings, but also for singing libellous songs and poems directly tending to a breach of the peace, and for holding up persons to shame and ignominy by ridiculous and degrading pictures and prints, or by reproachful or ignominious signs, such as fixing up a gallows over a man's door (*q*).

A party may be convicted, also, of a misdemeanour for publishing a libel upon a class of persons, such as the clergy of a particular diocese, or the residents of a particular locality, if the direct tendency of the pub-

(*l*) *Hearne* v. *Stowell*, 12 Ad. & E. 731. *Goldstein* v. *Foss*, 6 B. & C. 159. *Solomon* v. *Lawson*, 8 Q. B. 837.

(*m*) *Griffiths* v. *Lewis*, 8 Q. B. 852.

(*n*) *Alfred* v. *Farlow*, ib. 863.

(*o*) Hawkins' Pleas of the Crown, ch. 73; 3 Inst. 174; Bract. lib. 3. c. 36.

(*p*) De Libellis Famosis, 5 Co. 254. *Rex* v. *Topham*, 4 T. R. 194.

(*q*) De Libellis Famosis, ut sup.

lication is to stir up riot and disorder, and incite to a breach of the peace (*r*).

When a person, either by writing, or by publications in print, or by any other means, calumniates the proceedings of a court of justice, he renders himself liable to an indictment for a misdemeanour (*s*); but the propriety of a verdict, or the correctness of the decisions of a judge, may be canvassed and controverted, provided it be done with fairness and candour, and temperate reasoning and argument, published with a view to elucidate the truth, and not to bring the administration of justice into hatred and contempt (*t*).

The composing and writing of a libel, with a view to its publication, is in itself a misdemeanour, triable in the county where the libel was composed and published, though the publication afterwards takes place in a different county. If, therefore, a libel be written in one county and published in another, the libeller may be prosecuted in either county (*u*).

Upon an indictment, as well as in action, there is a great distinction between slander by word of mouth, and slander in a published writing. As regards slanderous writings, it is said that wherever an action will lie for composing or publishing them, without alleging any special damage, an indictment may also be maintained (*x*) ; but an indictment cannot be supported for mere verbal slander, unless it is seditious or blasphemous, or directly tending to a breach of the peace, or is uttered respecting a magistrate in the execution of his office (*y*). Thus, where it was said of an alderman, "When he puts on his gown Satan enters into it," and of a mayor, "You are a forsworn mayor, and have broke your oath," also, "You, Mr. Mayor, are a rogue and a rascal," it was held that these were but loose, unmannerly words, not punishable criminally by indictment (*z*).

The stat. 6 & 7 Vict. c. 96, ss. 4 & 5, makes a distinction in respect of punishment between persons who maliciously publish defamatory libels, knowing them to be false, and those who publish them without having any knowledge one way or the other on the subject.

When the truth of the matter may be given in evidence.—Formerly, in all cases of indictment or information for the public or criminal offence of libel, it was immaterial whether the libel was true or false, or whether the party libelled was of good or ill fame; for it was said that "in a settled state of government, a person grieved by any wrong done ought to lodge an information or complaint before the proper legal tribunals, and seek a remedy in the ordinary course of law, and not revenge himself

(*r*) *Rex* v. *Williams*, 5 B. & Ald. 595. *Rex* v. *Osborne*, 2 Barnard, 138, 166; 2 Swanst. 503.
(*s*) *Rex* v. *Watson*, 2 T. R. 199.
(*t*) *Rex* v. *White*, 1 Campb. 359.
(*u*) *Rex* v. *Burdett*, 4 B. & Ald. 95.
(*x*) Archbold's Criminal Pleading, by Welsby. LIBEL.
(*y*) *Rex* v. *Weltye*, 2 Campb. 142; 2 Salk. 698.
(*z*) *Reg.* v. *Langley*, 6 Mod. 125. *Rex* v. *Pocock*, 2 Str. 1158; ante, p. 700.

by the odious course of libelling" (*a*). But now, by 6 & 7 Vict. c. 96, s. 6, it is enacted, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as in the statute mentioned, may have the truth of the libel inquired into, but that the truth of it shall not amount to a defence, unless it was for the public benefit that the matters charged as libellous should be published.

Evidence for the defence.—If, upon the trial of any indictment or information for libel, evidence is given establishing a presumptive case of publication against the defendant by the act of any other person by his authority, it is competent to the defendant to prove that the publication was made without the defendant's authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part.

The public offence of libel against a private individual, being only a misdemeanour, does not in anywise suspend or interfere with the right of action for damages (*b*).

(*a*) De Libellis, ut sup. (*b*) Ante, pp. 28, 29.

CHAPTER XVIII.

OF FRAUDULENT MISREPRESENTATION AND DECEIT, FRAUDULENT CONCEALMENT, BREACH OF WARRANTY AND FALSE PRETENCES.

SECTION I.—*Of fraudulent misrepresentation and deceit, fraudulent concealment, breach of warranty, and false pretences.* —Wilful and unintentional deceit— —Representations by a party of a particular fact when he knows that he has no knowledge at all about it—Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of co-partnerships and joint-stock companies—Misrepresentation by directors—Publication of deceitful prospectuses and reports — Fraudulent breach of warranty—Proof of warranty —Private representations—False representations amounting to a warranty —Representations concerning matters which lie as much within the knowledge of one party as the other—Representations amounting merely to expressions of opinion and belief—Statements in answer to inquiries—Warranties by vendors—False representations of title—False representations by vendors and manufacturers of the character and quality of the articles they manufacture and sell—Sale of goods by sample—False representations by railway companies—Deceit by agents—False assumption of authority—Counterfeiting trade-marks—Warranty of articles sold with trade-marks upon them—Fraudulent assumption of the name of a bank—Deceit by provision-dealers—False and fraudulent representations by married women and infants—Fraudulent concealment on sales of chattels—Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried —Fraudulent sales with all faults and without allowance for any defect, error, or misstatement.

SECTION II.—*Of actions for fraud and deceit — Remedy by indictment and injunction.*—Parties, pleadings, defences, and evidence—Proof of fraudulent warranties on sales of horses—Proof of unsoundness—Damages recoverable —Indictments for obtaining money or goods by false pretences, and for the fraudulent use of trade-marks—Injunction to prevent fraud, and the fraudulent use of trade-marks.

SECTION I.

OF FRAUDULENT MISREPRESENTATION AND DECEIT; FRAUDULENT CONCEALMENT AND BREACH OF WARRANTY.

Of wilful deceit.—An action cannot be supported for the telling a bare, naked lie, *i. e.* saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and with-

out any intention that another should rely upon the false statement and act upon it (*c*); but if a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person has acted upon it, and thereby suffered damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong and loss, entitling the injured party to compensation (*d*). Where a gun had been delivered by the defendant to the plaintiff for the purpose of being used by him, with an accompanying representation that he might safely use it, and that representation was false to the defendant's knowledge, and the plaintiff, acting upon the faith of its being true, used the gun, and received damage thereby, it was held that he was entitled to recover compensation for the injury from the defendant (*e*).

If a defendant has made a false representation, knowing it to be false, with intent to induce, and has thereby induced, the plaintiff to enter into a contract into which, but for that misrepresentation, he would not have entered, and the plaintiff has been damnified by the falsehood, a case of fraud is made out, and an action for damages is maintainable (*f*). It is not necessary in all cases to show that the defendant knew the representation to be untrue; for if he made the statement for a fraudulent purpose, and without believing it to be true, and with the intention of inducing the plaintiff to do an act, and that act is done to the prejudice of the plaintiff, an action for damages is maintainable (*g*).

Unintentional deception.— But a person who has reason to believe, and actually believes, a particular fact to be true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistakened, and that his representation was unintentionally false (*h*); for if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, whereby the plaintiff was induced to neglect some important duty: but if it be shown that the defendant was under any legal obligation to state the truth correctly to the plaintiff, there would be a legal grievance in misleading him, for which an action would lie; still more so, if he made the false representation with a view to some unfair advantage to himself (*i*).

(*c*) *Behn* v. *Kemble*, 7 C. B., N.S. 260.

(*d*) Com. Dig. Action upon the case DECEIPT, A. 9, A 10. Parke, B., *Watson* v. *Poulson*, 15 Jur. 1112. "Dolus malus est omnis machinatio, calliditas, fallacia, ad circumveniendum, fallendum, decipiendum aliquem adhibita."—Dig. lib. 4, tit. 3, lex 1*q* § 2.

(*e*) *Langridge* v. *Levy*, 2 M. & W. 530; 4 M. & W. 337. *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 139. *Barry* v. *Croskey*, 2 Johns. & H. 21.

(*f*) *Canham* v. *Barry*, 15 C. B. 620.

(*g*) *Taylor* v. *Ashton*, 11 M. & W. 415.

(*h*) *Collins* v. *Evans*, 5 Q. B. 826. *Ormrod* v. *Huth*, 14 M. & W. 664. *Childers* v. *Wooler*, 29 Law J., Q. B. 129.

(*i*) *Barley* v. *Walford*, 9 Q. B. 208.

In order to maintain an action for deceit, or for a false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the party making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a fraud (*k*). Whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial (*l*). And whether the representation be made to the plaintiff, or a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff, in order that he might act upon it, and the plaintiff has acted upon it, and has sustained damage from the deceit (*m*). The general rule appears to be, that if any man makes a fraudulent representation for another to act upon it, either directly or indirectly, and it is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages. Thus, where a director of a company puts forth transferable shares into the market, and publishes and circulates false statements and representations for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the public announcements, and become purchasers of shares on the faith of the statements contained in them (*n*). But it must be shown that the damage of which the plaintiff complains was brought about by the wrongful act of the defendant (*o*).

False representations under pretence of a claim of right — False claim of lien. — An action is maintainable for a false and malicious representation, though made under the pretence of a claim of right, if it was made without reasonable and probable cause, and must have been known to be false by the party making it, and special damage has resulted to the plaintiff from the wrongful act. Thus, where a defendant knowing that there had been no agreement between him and the plaintiff for a lien on the plaintiff's goods, falsely pretended that he was entitled to a lien on them, and made the representation without any reasonable foundation for it, and from improper and malicious motives, and damage resulted therefrom to the plaintiff, it was held that the defendant was bound to make compensation to the plaintiff for the wrong done to him (*p*).

(*k*) Ld. Tenterden, C. J., *Polhill* v. *Walter*, 3 B. & Ad. 123. *Milne* v. *Marwood*, 15 C. B. 778; 24 Law J., C. P. 36.

(*l*) *Pasley* v. *Freeman*, 3 T. R. 60, 62, n. *Bedford* v. *Bagshaw*, ib. 65. Ld. Campbell, *Wilde* v. *Gibson*, 1 H. L. C. 663. *Barry* v. *Croskey*, ante, p. 737.

(*m*) *Langridge* v. *Levy*, ante, p. 737.

(*n*) *Scott* v. *Dixon*, 29 Law J., Exch. 62.

(*o*) *Collins* v. *Cave*, 4 H. & N. 234; 28 Law J., Exch. 204.

(*p*) *Green* v. *Button*, 2 C. M. & R. 716.

Representations by a party of his knowledge of a particular fact, when he knows that he has no knowledge at all about it.—If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and turns out to be false, and the party who has acted upon it has been deceived and damnified, he is entitled to maintain an action for compensation. Whoever pretends to positive knowledge of the existence of a particular fact, when in truth he knows nothing at all about it, does in reality make a wilful representation which he knows to be false, and if the representation is made in order that another may rely upon it and act upon it, and it is acted upon, and damage flows from the false representation, the party making it is in principle guilty of wilful deception and fraud (*q*). Lord Mansfield lays it down generally, that in a representation made to induce a party to make a contract, it is equally false for a man to undertake to assert that of which he knows nothing, as to affirm that to be true which he knows to be false (*r*). And, says Lord Kenyon, "If a man affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud. The fraud consists in asserting positively his knowledge of that which he did not know" (*s*). So, according to Maule, J., "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud: for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made" (*t*).

Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of third persons.—By 9 Geo. 4, c. 14, s. 6, it is enacted, that no action shall be brought to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith. A representation to be within the act, must be of the third person's trustworthiness, as evidenced

(*q*) *Smout* v. *Ilbery*, 10 M. & W. 10. Cresswell, J., and Wilde, C. J., *Jarrett* v. *Kennedy*, 6 C. B. 322. Erle, J., *Jenkins* v. *Hutchinson*, 13 Q. B. 748. *Randall* v. *Trimen*, 18 C. B. 786.

(*r*) *Pawson* v. *Watson*, Cowp. 788. *Pulsford* v. *Richards*, 17 Beav. 94.

(*s*) *Haycraft* v. *Creasy*, 2 East, 103.

(*t*) *Evans* v. *Edmonds*, 13 C. B. 786. *Milne* v. *Marwood*, 24 Law J., C. P. 37.

by his character, conduct, ability, credit, trade, or dealings, with intent that he may obtain personal credit on the faith of such representation (*u*). The word "person" is of extensive signification, and is applicable to a corporation sole or aggregate, as well as to a private individual (*x*). Any representation that a party may be trusted, constitutes a representation as to his credit and ability (*y*). If the representation is in writing, and signed by the defendant pursuant to the statute, and the defendant at the time he makes the representation knows that it is untrue, he will be responsible in damages in an action for deceit, if the plaintiff has been induced to give credit on the faith of it (*z*), although he has not relied altogether on the writing, but has trusted partly to the writing and partly to subsequent oral representations (*a*).

Where the defendant's son being about to open a shop, applied to the plaintiffs for a supply of goods upon credit, stating that he had a capital of 300*l.* to begin with, and referred them to his father, the defendant, for a corroboration of his statement, and the plaintiffs wrote to the father inquiring whether the son had, as he asserted, 300*l.* capital his own property, and the defendant wrote in reply that he had, whereas the defendant knew that his son had nothing but borrowed capital, it was held that this was a fraudulent misrepresentation, for which the defendant was liable in damages to the plaintiffs in an action for deceit (*b*). But if the party makes the representation in good faith, honestly believing it to be true, and has reasonable ground for his belief, he is not then responsible if he is altogether mistakened, and formed a wrong judgment in the matter, whatever damage may have resulted to the plaintiff therefrom (*c*).

Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies — Authentication thereof by a signed writing. — A representation by one of several partners as to the trustworthiness of the firm, is a representation as to the credit of another person within the statute 9 Geo. 4, c. 14, s. 6. It is not the less a representation of the solvency of the other partners that he includes himself (*d*). Under the word "person," in the statute, appears to be included a joint-stock company and railway company (*e*), so that representations by one member of the company of the circumstances, credit, and condition of the company, in order to induce another to lend his

(*u*) As to representations of the ability of parties, see *Lyde* v. *Barnard*, 1 M. & W. 101, and *Hamar* v. *Alexander*, 2 N. R. 241 (B. & P.), decided before the passing of the statute.

(*x*) *Boyd* v. *Croydon Rail. Co.*, 4 Bing. N. C. 669.

(*y*) *Swann* v. *Phillips*, 8 Ad. & E. 461.

(*z*) *Pasley* v. *Freeman*, 3 T. R. 51. *Foster* v. *Charles*, 6 Bing. 400; 7 Bing. 107.

(*a*) *Tatton* v. *Wade*, 18 C. B. 371. *Wade* v. *Tatton*, 25 Law J., C. P. 242.

(*b*) *Corbett* v. *Brown*, 8 Bing. 33.

(*c*) *Haycraft* v. *Creasy*, 2 East, 105.

(*d*) *Devaux* v. *Steinkeller*, 6 Bing. N. C. 89.

(*e*) *Boyd* v. *Croydon Rail. Co.*, 4 Bing. N. C. 669.

money, or subscribe, or take shares in the undertaking, must be authenticated by a signed writing, in order to be made the foundation of an action for deceit (*f*).

Misrepresentation by directors and officers of public companies — Publication of deceitful prospectuses and reports.—Where a defendant, knowing that a joint-stock company, of which he was a promoter and director, was a bubble company, and that no *bonâ-fide* dividend could be paid upon the shares, fraudulently pretended by a signed writing to guarantee the bearers of shares a minimum annual dividend of 33*l.* per cent., to induce persons to purchase shares, and the plaintiff, by reason of this representation, purchased shares, and lost his money, it was held that the defendant was responsible in damages to the plaintiff in an action for deceit (*g*). And where the defendant, a director of a joint-stock bank, sanctioned the publication of a report, with his signature attached thereto, professing to set forth the state and condition of the bank, and representing that a particular dividend had been fairly earned, and was properly payable out of profit, and the report was publicly sold, and the plaintiff purchased a copy of it, and read it, and bought shares in the bank, relying on its correctness, and the bank was proved to be insolvent, to the knowledge of the defendant at the time he sanctioned the publication of the report, and the plaintiff lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action against the defendant for damages (*h*).

If, therefore, directors of public companies authorise the publication and circulation of prospectuses and advertisements concerning the transactions and monetary affairs of the company, containing statements, with their signatures annexed thereto, which are false, to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true (*i*), they will be responsible in damages to parties who have taken shares, and invested money in the company, on the faith of these prospectuses, and have sustained damage in consequence thereof (*k*). And if the officers of the company knowingly and fraudulently aid in the concoction of false and deceitful reports, to induce persons to invest in the company, and investments are made and losses sustained by persons who have acted on the faith of such reports, the officers so acting will be responsible to the parties they have

(*f*) As to the recovery of money paid on the strength of fraudulent representations of the condition of trading companies, *Wontner* v. *Shairp*, 4 C. B. 439. *Watson* v. *Earl Charlemont*, 12 Q. B. 850.

(*g*) *Gerhard* v. *Bates*, 2 Ell. & Bl. 490.

(*h*) *Scott* v. *Dixon*, 29 Law J., Q. B. 62, n. *Bedford* v. *Bagshaw*, ib. 59. *Barry* v. *Croskey*, ante, p. 737.

(*i*) Ante, p. 739. *Taylor* v. *Asheton*, 11 M. & W. 415. *New Brunswick, &c. Rail. Co.* v. *Conybeare*, 31 Law J., Ch. 207. v. *Muggeridge*, 30 ib. 242; 1 Drew, & Sm. 363.

(*k*) *Clarke* v. *Dixon*, 28 Law J., C. P. 225; 6 C. B., N. S. 453.

defrauded (*l*). To support the action, the plaintiff must prove that he acted on the faith of the representation, and sustained actual pecuniary damage in consequence thereof (*m*).

The representations of a clerk or director, or a manager, are not the representations of the company, unless they are adopted and ratified by the shareholders at a general meeting of the company (*n*).

Fraudulent breach of warranty — Warranties by vendors in order to procure a purchaser. — Whenever the representation or statement amounts to a warranty of the fact stated, and is untrue, it is fraudulent, in contemplation of law, whether there was knowledge or want of knowledge of the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity he offers for sale, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard, and it is sufficient to prove the warranty broken to establish the deceit" (*o*). If, therefore, a watchmaker warrants a watch to go well, or a horse-dealer warrants his horse to be sound or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit and proper state for exportation, or a copper-manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys upon the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing his vessel, this is a fraud, though neither the watchmaker, the horse-dealer, nor the copper-manufacturer was aware of the fact at the time he gave the warranty (*p*). A warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is manifestly blind of one of them, or that a house is in perfect repair, when it has neither roof nor windows (*q*). To warrant a thing that may be perceived at sight is not good (*r*). If, therefore, at the time of the sale of a horse the animal is warranted sound, that is understood to mean, saving those manifest and visible defects which were obvious to all mankind, and known to the purchaser at the time he bought the animal (*s*). But a purchaser who relies upon a warranty is not bound to make any particular examination of a horse before he buys, to ascertain whether a defect exists. If, relying upon the warranty, he neglects to

(*l*) *Cullen* v. *Thomson*, 6 Law T. R., N. S. 870. Directors and officers so acting may also be punished for a misdemeanour, 24 & 25 Vict. c. 96, s. 84.

(*m*) *Eastwood* v. *Bain*, 28 Law J., Exch. 74; 7 W. R. 90.

(*n*) *Royal Brit. Bank, in re*, 3 Law T. R., N. S. 843; 9 W. R. 328.

(*o*) *Williamson* v. *Allison*, 2 East, 450.

(*p*) *Wallace* v. *Jarman*, 2 Stark. 162; Anon. Lofft, 146. *Gresham* v. *Postan*, 2 C. & P. 540. *Williamson* v. *Allison*, 2 East, 446. *Jones* v. *Bright*, 3 M. & P. 173.

(*q*) *Ekins* v. *Tresham*, 1 Lev. 102. *Dyer* v. *Hargrave*, 10 Ves. 507.

(*r*) *Baily* v. *Merrell*, 3 Bulstr. 95.

(*s*) *Margetson* v. *Wright*, 5 M. & P. 606; 7 Bing. 603.

make any particular examination of the animal, and fails consequently to discover a defect, which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action for deceit (*t*).

The purchaser of a warranted but worthless article is entitled to maintain an action for deceit, although it is stipulated that if he dislikes the article it shall be exchanged for another of the same value (*u*).

Proof of warranty—Warranties made pending a negotiation for the sale of property.—"As to selling with a warranty," observes Holt, C. J., "that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such warranty is not good. But in the other case the warranty is part of the contract" (*x*).

Private representations made prior to a sale by auction forming no part of the public contract of sale.—If what passes between a vendor and purchaser form no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observes Maule, J., "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a party who attends the sale, and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at a public auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud (*y*).

False representations amounting to warranty by a party of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach.—If the means of information lie peculiarly or exclusively

(*t*) *Holyday* v. *Morgan*, 1 El. & El. 1; 28 Law J., Q. B. 9.

(*u*) *Wallace* v. *Jarman*, 2 Stark. 162.

(*x*) *Lysney* v. *Selby*, 2 Ld. Raym. 1120. Salk. 211. *Canham* v. *Barry*, 15 C. B. 597; 24 Law J., C. P. 100. *Roscorla* v. *Thomas*, 3 Q. B. 236.

(*y*) *Hopkins* v. *Tanqueray*, 15 C. B. 130; 23 Law J., C. P. 162.

within reach of the person making the representation, and he pretends to know the truth of the matter, he must be taken to warrant his knowledge of the fact, and his want of knowledge constitutes a fraud (*z*).

A jeweller or a diamond merchant, who deals in diamonds and precious stones, has better means of knowing the nature and quality of the stones he sells than an unskilled stranger who comes to his shop to buy them. If, therefore, he represents a glittering stone to be a diamond, he impliedly warrants his knowledge of the truth of his representation. His statement amounts to a warranty of the fact to a purchaser, and the jeweller is responsible if the stone turns out to be only a piece of crystal, whether he knew the representation to be true or false (*a*). Where the vendor of a ship published a written description of the vessel, without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the vendor must be considered to have warranted the fact to be as he asserted, and that his want of knowledge constituted a positive fraud. "If he made the representation," observes Lord Mansfield, "not knowing at the time whether it was true or false, it is a fraud, if, in point of fact, it turns out to be false. It is equally false and fraudulent for a man to affirm his knowledge of that of which he knows nothing, as to aver that to be true which he knows is not true" (*b*).

Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other.— Where the real quality of the thing is an object of sense obvious to ordinary intelligence, and the parties making and receiving the representation have equal knowledge or means of acquiring information, and the correctness or incorrectness of the representation may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the representation is not made for the purpose of throwing the latter off his guard, and preventing him from making those inquiries and examinations which every prudent person ought to make, there is no warranty of the party's knowledge of the truth of his representation, or of the fact being as it is stated to be (*c*). In an action for deceit, it appeared that the defendant having a load of wood to be carried, came to the plaintiff, who was a carrier, and bargained with him for the carriage of it at 2*s*. a hundredweight, representing that there were eight hundredweight; whereupon the plaintiff, relying upon the representation, caused the wood to be put into his cart and carried, but finding

(*z*) *Cave* v. *Coleman*, 3 M. & R. 4. *Salmon* v. *Ward*, 2 C. & P. 211. *Liddard* v. *Kain*, 9 Moore, 356.

(*a*) *Chandelor* v. *Lopus*, 1 Smith's Lead. Cas. 77, 78.

(*b*) *Schneider* v. *Heath*, 3 Campb. 508. *Pawson* v. *Watson*, Cowp. 788. *Adamson* v. *Jarvis*, 4 Bing. 73.

(*c*) *Clapham* v. *Shillito*, 7 Beav. 150. *Scott* v. *Hanson*, 1 Sim. 14.

that he had got an overpowering load, and having killed two of his horses in dragging it along, he caused the wood to be weighed, when he found the weight to be twenty hundredweight; and thereupon he brought his action to recover compensation for the damage he had sustained by reason of the deceit, it was held that the action was not maintainable, as it was his own fault not to have weighed the wood before he put it into his cart. "There is a difference," observes Dodderidge, J., "where the carrier is absent and where he is present; for where the carrier is there present, it is very easy for him to see the difference between 800 and 2000 weight" (*d*).

If a man selling wares sells purple to one, saying to him, "this is scarlet," the statement is to no purpose, for that the other may perceive this, and this gives no cause of action to him. And if a man selling a horse represents him to be sound in wind and limb, this representation is confined to such defects as were not manifest and apparent to all observers. If, therefore, the horse was manifestly blind, or obviously lame, and the purchaser examined the animal before he bought it, and must have been aware of these patent defects, the vendor's representation will give no cause of action (*e*). If, however, the manifest defect is not necessarily of a permanent nature; if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation, the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased (*f*).

Representations amounting merely to expressions of opinion and belief.— When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault if he suffers himself to be deceived. If the party giving his opinion, or expressing his belief, does not possess any exclusive means of knowledge, and merely says that which he thinks to be true, there is no fraud, however erroneous may be the statement he has made. If, therefore, a defendant having reason to believe, and actually believing, a particular fact to be true, has represented it as such to the plaintiff, he is not, as we have seen, liable to an action merely because it turns out that he was mistakened, and that his representation was false (*g*). The credit to which a man is entitled in the commercial world, is a matter which does not lie exclusively within the knowledge of any one person. It is to a great extent matter of judgment and opinion, on which different men will form different opinions, and if a

(*d*) *Baily* v. *Merrell*, 3 Bulstr. 95.
(*e*) Ib. 95. *Margetson* v. *Wright*, 5 M. & P. 610; 7 Bing. 603.
(*f*) *Liddard* v. *Kain*, 9 Moore, 356.
(*g*) *Collins* v. *Evans*, 5 Q. B. 826. *Childers* v. *Wooler*, 20 Law J., Q. B. 136.

man in answer to inquiries respecting the solvency or credit of a particular individual, or of a partnership, or joint-stock company, does no more than state his own honest opinion, believing what he says to be true, he is not responsible for the correctness of the opinion, and does not warrant the fact to be as represented by him (*h*).

Statements in answer to inquiries—Information to sheriffs and public officers.—If a sheriff about to seize the goods or the person of a debtor under a writ of execution, makes inquiry of another as to whether certain goods do or do not belong to such debtor, or as to the identity of the person of the debtor, and the party applied to for information does no more than represent what he believes to be true, he is not responsible in an action for deceit if the information he gives turns out to be false, and the sheriff who has acted upon it believing it to be true has been damnified; but if a party officiously interferes and gives directions to the sheriff, he may make himself responsible for trespasses committed by the sheriff whilst acting in obedience to those directions, and may become liable to make good any damages which the sheriff himself has been obliged to pay in consequence of his having obeyed such directions (*i*); but it has been held that a mere indication of the defendant's place of residence, indorsed on the back of a writ of *fi. fa.* by the attorney of the plaintiff, for the purpose of affording the sheriff information, is not a direction to execute a writ against the party pointed out, so as to render the attorney responsible if the indorsement should turn out to be incorrect, and relieve the sheriff from the responsibility of making inquiry, and acting in the matter upon his own responsibility (*k*).

Warranties by vendors on sales of real property.—If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the party to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit, whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it; "for," says Gould, J., "the value of the rents was a thing hard to be known, and secret, known to none but the landlord and his tenants, and they might be in confederacy together." "If," observes Holt, C. J., "the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular, there, if

(*h*) *Haycraft* v. *Creasy*, 2 East, 105.

(*i*) *Collins* v. *Evans*, 5 Q. B. 830; ante, p. 505.

(*k*) *Childers* v. *Wooler*, 29 Law J., Q. B. 129; 8 W. R. 321. Wightman, J., dissentiente, *Cronshaw* v. *Chapman*, ante, p. 579.

the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular" (*l*).

Where the vendor of a public-house made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit (*m*).

False representations of title by vendors of corporeal and incorporeal hereditaments — Representations not amounting to a warranty.—Representations and assertions of title by a vendor of real property, where the title-deeds are submitted to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title, amount only to expressions of opinion and belief, and cannot be treated as a warranty (*n*). Every prudent purchaser of real property looks into the title of the vendor before he accepts a conveyance and pays the purchase-money, and he has a right to have a covenant for title on the part of the vendor inserted in the deed of conveyance; and if he waives his right of examination and approval of the title, and does not think fit to require any covenant for title on the part of the vendor, he must be presumed to have been content to take whatever estate or interest in the land the vendor might chance to possess, and when the vendor's title, such as it is, is actually conveyed to him, the rule of *caveat emptor* applies (*o*). But if a representation as to title was false, to the knowledge of the party making it, and was made for the purpose of preventing inquiry and covering a fraud, then it may be made the foundation of an action for deceit, although the party receiving and acting upon the representation had accepted a conveyance, without requiring any covenant for title.

Representation of title on sales of chattels amounting to a warranty.—"Where one having the possession of any personal chattel sells it, the bare affirming it to be his," observes Holt, C. J., "amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title could be made; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such a case to have either an express

(*l*) *Lysney* v. *Selby*, 2 Ld. Raym. 1120. *Ekins* v. *Tresham*, 1 Lev. 102.

(*m*) *Dobell* v. *Stevens*, 3 B. & C. 623. *Canham* v. *Barry*, 15 C. B. 597.

(*n*) *Roswell* v. *Vaughan*, Cro. Jac. 196.

(*o*) *Brce* v. *Holbech*, 2 Doug. 655; Ld. Alvanley, C. J., 3 B. & P. 170. *Duke* v. *Barnett*, 2 Coll. Ch. C. 337. *Maynard* v. *Moseley*, 3 Swanst. 655.

warranty or a good title" (*p*). Mr. Justice Buller, however, has disclaimed any distinction between the vendor's being in or out of possession, treating the affirmation as equivalent to a warranty in both cases (*q*), the true principle being "that he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages" (*r*). If a man does not sell as owner, but in some special character or capacity, such as sheriff or pawnbroker, and does not make any representation as to title, he is presumed to sell only such a title as he actually possesses (*s*).

False representation by manufacturers of the character and quality of the articles they manufacture and sell.—The manufacturer of an article has superior means of information as to the nature and quality of the article he makes than a stranger not engaged in the manufacture. If, therefore, he represents the article he makes to be of some superior or peculiar quality, or to be fit for some particular purpose, in order to recommend it to a purchaser, his representation amounts to a warranty of the fact. "It is not necessary," observes Best, C. J., "that the seller should say, 'I warrant;' it is sufficient if he says that the article he sells is of a particular quality, or fit for a particular specified purpose." Where, therefore, the plaintiff, a shipowner, on being introduced to the defendant, a copper-manufacturer, stated that he wanted some copper for sheathing a vessel, and the defendant said, "We will supply you well," whereupon the plaintiff gave an order for some copper, it was held that this amounted to a warranty on the part of the copper-manufacturer that the copper he supplied to the plaintiff in execution of the order should be fit for sheathing vessels, and that he was responsible in an action for deceit for furnishing defective copper unfit for that purpose. "This," observes Best, C. J., "will tend to protect the purchaser, who is necessarily ignorant of the nature of the article sold, from imposition, whilst the person who manufactures it must, or ought to, know its particular virtues and qualities (*t*). But when the purchase is of a well-known ascertained article, and the manufacturer represents that it is fit for the purpose for which it is made, and for which it is generally used, there is no warranty on the part of the vendor that it is fit for any peculiar or special purpose for which the purchaser requires it (*u*).

A person who receives the order and gets the article made is as much the manufacturer of it as the person who actually makes it (*x*).

(*p*) *Medina* v. *Stoughton*, 1 Salk. 210. *Crosse* v. *Gardner*, Carth. 90.

(*q*) *Pasley* v. *Freeman*, 3 T. R. 58.

(*r*) Per Best, C. J., *Adamson* v. *Jarvis*, 4 Bing. 73. *Furnis* v. *Leicester*, Cro. Jac. 474; 1 Roll. Abr. 90, pl. 6.

(*s*) *Chapman* v. *Speller*, 14 Q. B. 624. *Morley* v. *Attenborough*, 3 Exch. 500.

(*t*) *Jones* v. *Bright*, 3 M. & P. 174; 5 Bing. 533.

(*u*) *Chanter* v. *Hopkins*, 4 M. & W. 399. *Camac* v. *Warriner*, 1 C. B. 367.

(*x*) *Brown* v. *Edgington*, 2 M. & Gr. 279. Addison on Contracts, p. 229.

Representations by a vendor who is told that the purchaser wants the article he proposes to buy for a particular purpose.—If a stranger goes to a shop and tells the shopkeeper that he wants an article fit for a particular specified purpose, and it is the clear understanding of the parties that the purchaser relies upon the skill and judgment of the shopkeeper for the supply of an article fit for the purpose specified, there is an implied warranty on the part of the shopkeeper that the article he furnishes is reasonably fit for that purpose. "It appears to me," observes Tindal, C. J., "to be a distinction well founded, both on reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed" (*y*).

False representations by vendors made to absent purchasers amounting to a warranty.—Wherever the purchaser has no opportunity of inspecting the commodity he buys, the rule of *caveat emptor* does not apply. Every representation, therefore, made by a vendor to an absent purchaser, as to the quality or fineness of the article he offers for sale, amounts to a warranty of the fact to such absent purchaser, who has no means of judging for himself, but relies exclusively on the judgment and good faith of the vendor (*z*). If a purchaser orders a particular article to be forwarded to his agent abroad for a foreign market, and the vendor executes the order, and pretends, or represents, that he has sold the particular article required, and the purchaser has had no opportunity of inspection or examination, the representation of the vendor amounts to a warranty of the fact (*a*). If an article, represented to be of a particular or peculiar quality, turns out to be of a substantially different or inferior quality, it does not accord with the representation, and damages are therefore recoverable (*b*). "A seller," observes Lord Ellenborough, "is unquestionably liable to an action for deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing, or if he do so in such a manner as to induce the buyer to forbear from making the inquiries, which for his own security and advantage he would otherwise have made" (*c*).

False representations by vendors where the purchaser has means of exami-

(*y*) Tindal, C. J., 2 M. & Gr. 200.
(*z*) Ld. Ellenborough, *Gardiner* v. *Gray*, 4 Campb. 145.
(*a*) *Bridge* v. *Wain*, 1 Stark. 504.
(*b*) *Wieler* v. *Schilizzi*, 25 Law J., C. P. 90.
(*c*) *Vernon* v. *Keys*, 12 East, 637.

nation and judgment.—But whenever the vendor is not himself the manufacturer of the goods he sells, and the purchaser is afforded the means of inspection and examination, and of forming his own judgment of their quality, the representations made by the vendor of the quality of the goods amount merely to assertions of his own opinion and belief, and not to a warranty. If, therefore, the representation is honestly made, and is believed at the time to be true by the party making it, it does not constitute a fraud in law, though it was not true in point of fact. The rule of *cáveat emptor* applies, and the representation does not furnish a ground of action (*d*).

Sale of goods by sample.—Every person who exhibits a sample of goods for sale, impliedly represents or warrants that the sample has been fairly taken from the bulk of the commodity, and he does no more than this. The purchaser takes the risk of all latent defects and infirmities inherent in the article, and unknown to the seller, whether they arise from natural causes or fraudulent dealings with the goods by parties through whose hands they have passed. Thus, where the plaintiff bought hops of the defendant, whom he knew not to be the grower, by samples taken from the pockets in which the commodity was closely packed, and at the time of the sale the samples answered fairly to the commodity in bulk, and no defect was perceptible at the time to the buyer; but owing to the grower of the hops having fraudulently watered them after they were dried, to increase their weight, they gradually deteriorated in quality, and became utterly unsaleable shortly after their removal to the defendant's warehouse, it was held that the defendant, who had fairly drawn and exhibited the samples, and was wholly ignorant of the fraud at the time of the sale, was not responsible for the latent defect afterwards discovered in the hops, although it rendered them unmerchantable and of no value in the hands of the buyer. Here the vendor and purchaser had both equal means of knowledge. Both examined the sample, and neither of them discovered, or had the least idea of the defect which was afterwards disclosed by the gradual process of heating. The maxim of *caveat emptor*, therefore, applied (*e*).

So where cotton had been fraudulently packed in America, the interior of the bales being filled with bad, unmerchantable cotton, and the outer part of the bales from whence the samples would be taken with cotton of superior quality, and the cotton so falsely packed was consigned to a Liverpool merchant, who drew samples in the ordinary way, and exhibited them to the plaintiff, who purchased and received forty-five of the bales, and then brought his action against the defendant for the deceit, it was held that the action was not maintainable unless the jury

(*d*) *Ormrod* v. *Huth*, 14 M. & W. 664. (*e*) *Parkinson* v. *Lee*, 2 East, 320.

could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practised in the packing of the bales, or had themselves acted in the matter against good faith, or with some fraudulent purpose (*f*). And generally, if it was to be understood that there was to be a purchase of the article shown by sample, and the sample is fairly taken from the bulk, there is no misrepresentation or deceit, although the vendor may have given an incorrect description of the age or quality of the article, provided the description was honestly given in full belief of its truth (*g*).

False representations by railway companies amounting to a warranty.— It has been held that railway companies must be taken to warrant the truth of the representations made by them in their published time-tables as to the time of the starting of their trains, so that if the representation is untrue, it is what the law calls a fraudulent representation, and may be made the foundation of an action for deceit by any person who has relied upon the representation, and has sustained damage in consequence thereof (*h*).

False representation of authority — Pretended agency — Deceit by agents. —If the vendor of goods affirm that the goods he sells are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B buys them, when, in truth, they are the goods of another, yet if he sell them falsely and fraudulently on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B shall have an action for this deceit (*i*). If an agent who has no authority to make a contract in the name of his principal, and knows it, nevertheless makes the contract as having such authority, he is responsible in an action for deceit, "for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. Where, also, a party making a contract as agent *bonâ fide* believes that he has authority, but has in fact no authority, he is still personally liable. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, who is wholly ignorant of the grounds

(*f*) *Ormrod* v. *Huth*, 14 M. & W. 663.
(*g*) *Carter* v. *Crick*, 4 H. & N. 412; 28 Law J., Exch. 238.
(*h*) *Denton* v. *Gt. Northern Rail. Co.*, 5 Ell. & Bl. 867; 25 Law J., Q. B. 129.
(*i*) 1 Roll. Abr. 91, pl. 7.

on which such belief of the supposed agent is founded, and who has relied on the correctness of the assertion, it is equally just that he who makes the assertion should be personally liable for its consequences (*k*). "One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it" (*l*).

Where, therefore, the defendant had represented himself to be the agent of one Gardner, and as such authorised to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation (*m*). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who by an untrue assertion believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorised, that the authority he professes to have does in point of fact exist" (*n*).

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority

(*k*) Alderson, B., *Smout* v. *Ilbery*, 10 M. & W. 9. *Polhill* v. *Walter*, 3 B. & Ad. 114.

(*l*) *Jenkins* v. *Hutchinson*, 13 Q. B. 748. *Randell* v. *Trimen*, 18 C. B. 786; 25 Law J., C. P. 307. *Richardson* v. *Dunn*, 8 C. B., N. S. 655; 30 Law J., C. P. 44.

(*m*) *Collen* v. *Wright*, 8 Ell. & Bl. 647; 26 Law J., Q. B. 147; 27 ib. 215.

(*n*) Willes, J., *Collen* v. *Wright*, 27 Law J., Q. B. 217. *Pow* v. *Davis*, 7 Ell. B. & S. 220; 30 Law J., Q. B. 257.

vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess (*o*).

A mistake made by an agent in describing the quantity of goods he had bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable for negligence or a breach of duty, but does not render him liable to an action for deceit (*p*); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer (*q*).

When a principal is responsible for the fraud of his agent.—Deceits and frauds practised by agents do not, in general, fall upon the principal, unless the principal adopts and takes the benefit of the fraudulent act with knowledge of the fraud (*r*). "Where fraud has been committed, and a third person is concerned who was ignorant of the fraud, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it, but when once he takes the benefit he becomes a party to the fraud" (*s*).

False assumption of authority, as between master and servant, employer and employed.—Every man who employs another to do an act which the employer assumes to have, and appears to have, a right to authorise him to do, impliedly warrants that he has the authority he pretends to have, as the means of knowledge are peculiarly within his power; and if he has no such authority he is guilty of deceit, and must indemnify his servants or agents for all such wrongful acts as have been done by them in obedience to his commands, and which would have been lawful if the employer had the authority he pretended to have (*t*). If a landlord employs a bailiff, and represents that he has a right to distrain on a tenant for rent, and signs a distress-warrant, and delivers it to the bailiff to be executed, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress, he may maintain an action against the landlord for deceit, although the landlord made the representation believing it to be correct, and without any intention to deceive (*u*).

Counterfeiting trade-marks — Fraudulent use by one person of the trade-mark of another with intent to deceive.—If a manufacturer has adopted a particular mark to denote that the goods so marked were made by him,

(*o*) *Macgregor* v. *Deal & Dover, &c.*, 22 Law J., Q. B. 69.

(*p*) *Thorn* v. *Bigland*, 8 Exch. 729.

(*q*) *Pewtriss* v. *Austen*, 6 Taunt. 522.

(*r*) Addison on Contracts, 5th edn. 617–621. *Udell* v. *Atherton*, 7 H. & N. 181; 30 Law J., Exch. 337. *Barry* v. *Croskey*, 2 Johns. & Hem. 1. *New Bruns. & Can. Rail. Co.* v. *Conybeare*, ante, p. 741.

(*s*) Wood, V. C., *Scholefield* v. *Templer*, 1 Johns. 163.

(*t*) Best, C. J., *Adamson* v. *Jarvis*, 4 Bing. 72.

(*u*) *Rawlings* v. *Bell*, 1 C. B. 959.

and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the party injured is entitled to an action for the deceit (*x*). Where "a clothier in Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another who made ill cloth put the Gloucestershire mark upon it, and an action was brought by him who bought the cloth for this deceit, it was adjudged maintainable" (*y*). The manufacturer, also, who is damnified in having goods fraudulently palmed upon the world as goods made by him when in truth they are not so, is also entitled to an action for the deceit (*z*). He does not, in an action of this sort, claim any abstract right to the exclusive use of the mark in question. He merely says that, having adopted a particular mark to denote that the goods so marked were made by him, and the mark having become known and understood in the trade, the public were led to believe that goods so marked were of his manufacture, and that the defendant marked his goods with a mark resembling the plaintiff's mark with a view to deceive the public to purchase the same as and for the plaintiff's goods, and by reason thereof the plaintiff sustained damage (*a*).

Warranty of the genuineness of articles with trade-marks.—By 25 & 26 Vict. c. 88, s. 19, it is enacted, that where any person shall, after the 1st of December, 1863, sell, or contract to sell, to any other person, any chattel or article with any trade-mark thereon, or upon any thing together with which such chattel or article shall be sold, or contracted to be sold, the sale or contract to sell shall be deemed to have been made with a warranty by the vendor to the vendee, that every trade-mark upon such chattel or article, or upon any such thing sold therewith as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

Warranty of description as to quantity or country.—By 25 & 26 Vict. c. 88, s. 20, it is further enacted, that in every case in which at any time after the 31st day of December, 1863, any person shall sell, or contract to sell, to any other person, any chattel or article upon which, or upon any thing together with which, such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have

(*x*) *Crawshay* v. *Thompson*, 4 M. & Gr 386, n.

(*y*) 33 Eliz. cited by Dodderidge, J., Cro. Jac. 471.

(*z*) Dodderidge, J., Poph. 144.

(*a*) *Rodgers* v. *Nowill*, 5 C. B. 127.

been made, manufactured, or produced, the sale, or contract to sell, shall in every such case be deemed to have been made with a warranty by the vendor, to or with the vendee, that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

Fraudulent assumption of the name of a bank.—Where the declaration in an action against a banking corporation stated that the plaintiff had established in the city of London a bank called the Bank of London, and had caused that name to be affixed on the offices of the bank, and had made the bank well known as the only bank of London, and that the defendant, after the plaintiff's bank had been so established, and whilst it was the only bank styled the Bank of London, wrongfully established another bank in the city of London under the name of the Bank of London, and as representing the plaintiff's bank, and under the pretence that the bank so established was the plaintiff's bank, whereby the plaintiff was injured in his business, &c., it was held that the declaration disclosed no cause of action; but it seems to have been thought that, if it had been averred and shown that the plaintiff carried on the business of a banker under the name and style of the Bank of London, and that whilst he was so carrying on business the defendant came and established another bank of the same name, and carried on business under that name, for the purpose of making it believed that the plaintiff's business was carried on at the defendant's bank, and so drew away customers from the plaintiff's bank, there would have been a good cause of action (*b*).

Deceit by provision-dealers in selling unwholesome food.—Every dealer in provisions offered for sale as food for man, who knowingly sells corrupt and unwholesome food, whereby the plaintiff is injured, is liable to an action for deceit; but he cannot be made responsible in damages unless it is shown that he sold it as sound and good meat, knowing it at the time to be unsound and unfit for food (*c*).

False and fraudulent representations by married women and infants.—Neither a married woman nor her husband can be sued for a false and fraudulent representation by such married woman that she was a *feme sole*, whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married (*d*). Nor can an infant be sued for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him (*e*).

Fraudulent concealment.—A *suppressio veri*, or concealment of the truth,

(*b*) *Lawson* v. *Bank of London*, 18 C. B. 84; 25 Law J., C. P. 188.

(*c*) *Burnby* v. *Bollett*, 16 M. & W. 644. *Emmerton* v. *Matthews*, 7 H. & N. 586; 31 Law J., Exch. 139.

(*d*) *Liverpool Adelphi, &c.* v. *Fairhurst*, *Wright* v. *Leonard*, ante, p. 30.

(*e*) Ib., *Johnson* v. *Pye*, 1 Sid. 258. *Bartlett* v. *Wells*, 1 B. & S. 836; 31 Law J., Q. B. 57.

will alone, in certain cases, and under certain circumstances, amount to a fraud, and give rise to an action for deceit. Where on the sale of a house the seller, being conscious of a defect in a main wall, plastered it up and papered it over, it was held, that as the vendor had expressly concealed the defect, the purchaser might recover damages in an action for deceit (*f*). And where on a sale of goods the vendor knew that he had no title to the goods he sold, and failed to disclose the fact to the purchaser, it was held that the latter was entitled to maintain an action for damages "on the ground that he had been deceived, and was the worse for the deceit, and that he was entitled to recover to the extent to which he had been damnified by the deception" (*g*). So, where an auctioneer sold a lease which he knew to have been forfeited in consequence of a breach of covenant by the lessee, and failed to disclose the forfeiture, and the plaintiff bought the lease in ignorance of the breach of covenant and forfeiture, it was held that the auctioneer had been guilty of a deceit, and was responsible in damages to the plaintiff (*h*).

If it is a custom of trade for a vendor of merchandise to disclose particular defects at the time of the sale, if he is cognizant of their existence, the vendor will be responsible in damages for a fraudulent concealment if, knowing of the particular defect, he fails to make the customary disclosure (*i*). And if the vendor is cognizant of any serious secret defect materially deteriorating the value of the goods in the market, and nevertheless offers them for sale at the ordinary market price, and knows that the purchaser is deceived by the appearance of the goods at the time of the sale, and is labouring under a gross delusion respecting them, and the vendor takes no trouble to rectify the mistake and disclose the real facts to the purchaser, he is responsible in damages for wilful deceit (*k*). But if the defect is patent, and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have seen, for wilful deceit (ante, p. 756). "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth" (*l*). If the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by

(*f*) Anon. cited by Gibbs, J., *Pickering* v. *Dowson*, 4 Taunt. 785.

(*g*) Gibbs, C. J., *Peto* v. *Blades*, 5 Taunt. 659.

(*h*) *Stevens* v. *Adamson*, 2 Stark. 422.

(*i*) *Jones* v. *Bowden*, 4 Taunt. 846.

(*k*) *Hill* v. *Gray*, 1 Stark. 434.

(*l*) "Si jeo vend chivall que ad null oculus la null action gist, auterment lou il ad un counterfeit faux et bright eye!" *Southerne* v. *Howe*, 2 Rolle, rep. 5.

the deception; but in a general sale of a horse, when there is no warranty, the rule of *caveat emptor* applies; and, except there be a deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor of the animal (*m*).

Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.—Every person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger and risk attendant upon the receiving and dealing with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous (*n*).

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the scienter is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum (*o*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger, which he had the means of knowing, and ought to have communicated" (*p*).

Fraudulent sales with all faults.—A sale of a chattel to a purchaser "with all faults" does not mean that the purchaser is to take it with all frauds. Such a stipulation, therefore, will not protect the vendor from an action for deceit, if he has resorted to any artifice to conceal a defect,

(*m*) *Hill* v. *Balls*, 2 H. & N. 299; 27 Law J., Exch. 45.

(*n*) *Hutchinson* v. *Guion*, 5 C. B., N. S. 149; 28 Law J., C. P. 63; 6 W. R. 757. *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 139.

(*o*) *Williams* v. *East Ind. Co.*, 3 East, 192.

(*p*) *Brass* v. *Maitland*, 6 Ell. & Bl. 486. *Gibbon* v. *Paynton*, 4 Burr. 2298. *Batson* v. *Donovan*, 4 B. & Ald. 33, 37.

or has made use of any false representation for the purpose of lulling to sleep the vigilance of the purchaser. Therefore, where a ship was sold to be taken as she lay with all faults, and it was proved that the vendor had used means to prevent purchasers from discovering certain defects in the vessel, and had also knowingly made a false representation of her condition at the time of the sale, it was held by Mansfield, C. J., that although the words "to be taken with all faults" were very large, and framed expressly to exclude the buyer from calling upon the seller for any defect in the thing sold; yet if the seller was guilty of any positive fraud in the sale, either in the making a false representation or in using means to conceal a defect, the seller would be answerable in damages to the buyer for the deceit (*q*). And where the vendor of a vessel which was to be taken with all faults, represented the vessel in his handbills and advertisements of the sale to have been built in 1816, whereas she had been launched the year before, and the difference of time materially affected her value, it was held that the purchaser was entitled to recover damages for the deceit, notwithstanding the stipulation that the vessel was to be taken with all faults. "The vendor," observes Abbott, C. J., "ought either to be silent or to speak the truth. In case he spoke at all, he was bound to disclose the real fact" (*r*). "The meaning of selling with all faults," observes Heath, J., "is that the purchaser shall make use of his eyes and understanding to discover what faults there are; but I admit that the vendor is not to make use of any fraud or practice to conceal a defect" (*s*).

Fraudulent sales with all faults, and without allowance for any defect, or error, or misstatement.—A stipulation that the thing sold is to be taken with all faults, and without allowance for any defect, error, or misdescription, will protect the vendor from all unintentional mistakes, misstatements, and misdescription (*t*), but not from the consequences of any wilful deception.

SECTION II.

OF ACTIONS FOR FRAUD AND DECEIT, AND THE REMEDY BY INJUNCTION.

Actions for deceit — Parties to be made plaintiffs.— The person to whom a false representation was made to be acted upon, and who acted upon it, believing it to be true, and sustained damage thereby, is the party to sue for compensation; but an action may also be brought by a person to whom the representation is indirectly made, as where it is made to one man in

(*q*) *Schneider* v. *Heath*, 3 Campb. 507.
(*r*) *Fletcher* v. *Bowsher*, 2 Stark. 565. *Baglehole* v. *Walters*, 3 Campb. 154.
(*s*) *Pickering* v. *Dowson*, 4 Taunt. 784.
(*t*) *Taylor* v. *Buller*, 5 Exch. 779; 20 Law J., Exch. 21.

order to be communicated to another. Where the father of the plaintiff told the defendant that he wanted to purchase a gun for the use of the plaintiff, and the defendant, in order to effect the sale, warranted the gun to have been made by Nock, and that it was a safe and secure gun, and the father then purchased the gun and delivered it to the plaintiff, who, on the faith of the warranty, and believing it to be true, used the gun, and was injured by its bursting in his hand, it was held that the plaintiff was entitled to sue the defendant for damages, as there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results. "We decide," observes the court, "that the defendant is responsible in this case for the consequences of his fraud whilst the gun was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew the gun was purchased" (*u*). And where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner being unable to complete the purchase, got the plaintiff to take his contract off his hands by repeating to him the false representation made by the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. "The defendant," observes Bosanquet, J., "knowing that the fraudulent representation he had made to Bourner had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of Bourner's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself" (*x*).

In the case of fraudulent representations through the medium of trade-marks, intended to pass off goods of inferior make as the superior goods of a celebrated manufacturer, either the manufacturer who is injured by having another man's goods palmed off upon the market as his goods (*y*), or the purchaser who has been deceived and defrauded, may bring the action (*z*).

(*u*) *Langridge* v. *Levy*, 2 M. & W. 532; 4 ib. 337. *Blakemore* v. *Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1052; 27 Law J., Q. B. 167. *Farrant* v. *Barnes*, ante, p. 757.

(*x*) *Pilmore* v. *Hood*, 5 Bing. N. C. 109.

(*y*) 22 Eliz. cited by Dodderidge, J., Poph. 142.

(*z*) *Crawshay* v. *Thompson*, 4 M. & Gr. 386, n.

If the vendor of a lamp represents the lamp to be fit and proper to be used, knowing that it is not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife, joining her husband for conformity, or that individual, will be entitled to an action for the deceit, upon the principle that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit (*a*).

Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and to influence the share-market, and operate upon the minds of sharebrokers and purchasers of shares; and where they are posted up in public places by direction of the board, or are to be bought by persons who desire information concerning the actual situation and condition of the company, they are deemed, as we have seen, in point of law, to be addressed to all who peruse them, and are induced to buy shares by the statements contained in them (*b*). Representations made to the Stock Exchange Committee, to be publicly promulgated amongst the frequenters of the Stock Exchange, are deemed to be made to such frequenters of the Stock Exchange as have seen and acted upon the representations, and have been deceived and damnified thereby.

The plaintiff, in an action for deceit, alleged in his declaration that the defendant was the promoter of a gold mining company, and had issued shares, and published and circulated a prospectus for the purpose of inducing persons to purchase shares, representing the amount of capital, &c., and that at the time of the publication of this prospectus it was publicly known that the committee of the Stock Exchange in London would not appoint a settling-day for shares in any mining company, or permit the same to be inserted in the official list of the committee, until the subscription-list of the company was full, and not less than two-thirds of the scrip had been paid upon and were ready to be issued; and that the defendant, in order to procure the insertion of the shares of the company in the official list, and induce the committee to appoint a settling-day for the shares, and induce persons to purchase shares in the belief that their insertion in the list had been properly procured, falsely and fraudulently represented to the committee that the subscription-list was full; that 40,711 shares had been paid upon, for all which scrip certificates had been issued, or were ready for delivery; that the produce of the 40,711 shares had been received by the defendant, and was in the hands of his bankers to his credit, and thereby induced the committee to insert the shares of

(*a*) *Longmeid* v. *Holliday*, 6 Exch. 766.
(*b*) *Scott* v. *Dixon*, 29 Law J., Exch. 62, n. *Bedford* v. *Bagshaw*, ib. 59. *Gerhard* v. *Bates*, 2 Ell. & Bl. 476. *Barry* v. *Croskey*, ante, p. 737.

the company in the official list, and appoint a settling-day for such shares; and that the plaintiff, having notice of the said prospectus, and having seen the shares quoted and inserted in the official list, and believing that they had been admitted and inserted therein by fair, honest, and proper means, and that the subscription-list of the company was full, and that not less than two-thirds of the scrip had been paid upon, and either had been issued, or were ready to be issued, was thereby induced to purchase shares in the company. The declaration then went on to allege the falsehood of the representations made to the committee of the Stock Exchange, the knowledge thereof by the defendant, the deception of the plaintiff, and the damage he had thereby sustained, and it was held that all persons who were induced to buy the shares of the company by seeing them quoted in the official list of the Stock Exchange, were within the scope of the false and fraudulent representation made by the defendant, and were entitled to maintain an action against him for damages (*c*).

By 20 & 21 Vict. c. 54, s. 8, it is enacted, that if any director, manager, or public officer of any body corporate or public company shall concur in making, circulating, or publishing any written statement or account, which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a MISDEMEANOUR. This statute does not in any wise interfere with the civil remedy by way of action against any such director, manager, or officer, for damages for fraud and deceit; the rule requiring parties to proceed for the criminal offence before they pursue their civil remedy applying only, as we have seen, to *felonies* (ante, pp. 28, 29).

Parties to be made defendants — Principal and agent. — If a fraudulent act has been committed by an agent without the knowledge of the principal, and the latter afterwards adopts the act, and takes the benefit of the fraud, he will be responsible in damages to the party who has been deceived and injured by the fraudulent act (*d*); but if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, he will not be responsible for the fraud if it was committed by the agent without his sanction and authority, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter (*e*). Where a merchant employed a factor to sell

(*c*) *Bedford* v. *Bagshaw*, 4 H. & N. 538; 29 Law J., Exch. 59. *Bagshaw* v. *Seymour*, ib. 62, n.; 32 Law T. R., H. L. 81.

(*d*) *Wright* v. *Crookes*, 1 Sc. N. R. 685. Wilde, B., *Udell* v. *Atherton*, ante, p. 753.

(*e*) *Grant* v. *Norway*, 10 C. B. 688. *Cornfoot* v. *Fowke*, 6 M. & W. 369. *Brady* v. *Tod*, 9 C. B., N. S. 592; 30 Law J., C. P. 223.

silk for him, and the factor fraudulently sold one sort of silk for another, "and the doubt was whether this deceit could charge the merchant," Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, "though not *criminaliter* yet *civiliter;* for, seeing somebody must be a loser by this deceit, it is more reason that he that employs the deceiver should be a loser than a stranger" (*f*). "The principal and his agent are for this purpose completely identified" (*g*). "The representation, if fraudulently made by the agent, will bind the principal equally as if made by the principal" (*h*).

A servant employed to sell a horse and receive the price, has an implied authority to warrant the horse (*i*), but not a servant who is merely employed to deliver the animal to a purchaser (*k*). If a broker who is authorised to advertise a ship for a voyage warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority (*l*). If an agent employed by the indorsees of a bill to get it discounted, and not restricted as to the mode of doing it, warrants the bill to be a good bill, his employers are bound by the warranty (*m*).

Fraudulent representations by joint-stock companies — Parties to be made defendants.—The shareholders of a joint-stock company cannot be made individually responsible in damages in an action for deceit, for adopting and authorising the publication of a false and fraudulent report respecting the pecuniary state and condition of the company, unless it be proved that the report has been signed by them (ante, p. 740), and was false to their knowledge at the time they attached their signatures to it (*n*); but the company itself may be made responsible for fraud through the medium of acts done by the managers and shareholders in the management of its concerns. If, with a view to raise the marketable value of the shares of a tottering and insolvent company, a report, fraudulently misrepresenting the real state of the concern, the real amount of its assets, and of the demands upon it, is received and adopted by the shareholders at a general meeting, and promulgated and published to the world to induce strangers to come forward and invest capital in the concern, this must be taken as between the company and third persons, who receive and act upon the report to their detriment, to be a representation by the company: "otherwise companies of this sort would be in this extraordinary predicament, that they might employ, nay, must employ, agents to carry on their con-

(*f*) *Hern* v. *Nichols*, 1 Salk. 289.
(*g*) Ld. Denman, C. J., *Fuller* v. *Wilson*, 3 Q. B. 67.
(*h*) Tindal, C. J., ib. 1010. *Taylor* v. *Green*, 8 C. & P. 319. But see *Udell* v. *Atherton*, ante, p. 753, and Addison on Contracts, pp. 617, 618.
(*i*) *Alexander* v. *Gibson*, 2 Campb. 555.
(*k*) *Woodin* v. *Burford*, 2 Cr. & M. 392.
(*l*) *Rinquist* v. *Ditchell*, 2 Campb. 556, n.
(*m*) *Fenn* v. *Harrison*, 4 T. R. 177.
(*n*) *Barry* v. *Croskey*, 2 Johns. & H. 27.

cerns, and those agents, with the authority of the company, might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, the company may benefit by those misrepresentations, without being at all liable to be told, That is your fraud" (*o*).

But the representation in these cases must be within the scope and authority of the party making it; for where a representation on behalf of a public company was made by the mere law agent or solicitor of the company, who was acting *ultra vires* when he made the representation, the company was held not to be bound by his act (*p*).

The directors, managers, and officers who sign and circulate reports wilfully and knowingly misrepresenting the pecuniary condition of the company for the purpose of enhancing the value of the shares are, as we have seen, personally responsible in damages to all who have acted upon the faith of such reports, and have been deceived and injured by them (*q*).

Of declarations for deceit.—It is not necessary, in a declaration for a deceitful representation, to set out the representation in the precise words in which it was made. It is enough to state the substance and effect of it (*r*). This is the case with declarations for the assertion of a false claim of lien by the defendant upon the plaintiff's goods (*s*); a false assumption of authority to accept bills by procuration (*t*); a false assumption of title to goods (*u*); false representations by railway companies as to the time of the starting of their trains (*x*); by managing directors of joint-stock companies as to the amount of dividend guaranteed to the shareholders (*y*); by secretaries of insurance companies as to the management and financial condition of the company (*z*); false representations of authority to distrain (*a*); false representations that the patterns and designs of silk goods had been copied from registered patterns (*b*); false representations as to the character, credit, and circumstances of third parties (*c*); or of a firm or company of which the party making the representation is a member (*d*); false representations by agents of the sums due to them from their principals (*e*); false representations of the character, quality, or make of goods through the medium of counterfeit trade-marks and labels (*f*); and false

(*o*) *Glasgow Nat. Ex. Co.* v. *Drew*, 2 Macq. Sc. A. 124.

(*p*) *Burnes* v. *Pennel*, 2 H. L. C. 497, cited 2 Macq. Sc. A. 125.

(*q*) Ante, p. 741. *Stainback* v. *Fernley*, 9 Sim. 556.

(*r*) *Gutsole* v. *Mathers*, 1 M. & W. 503.

(*s*) *Green* v. *Button*, 2 C. M. & R. 707.

(*t*) *Polhill* v. *Walter*, 3 B. & Ad. 114.

(*u*) *Dyster* v. *Battye*, 3 B. & Ald. 448.

(*x*) *Denton* v. *Gt. North. Rail. Co.*, 5 Ell. & Bl. 860; 25 Law J., Q. B. 129.

(*y*) *Gerhard* v. *Bates*, 2 Ell. & Bl. 479.

(*z*) *Pontifex* v. *Bignold*, 3 Sc. N. R. 390.

(*a*) *Rawlings* v. *Bell*, 1 C. B. 951.

(*b*) *Barley* v. *Walford*, 9 Q. B. 199.

(*c*) *Corbett* v. *Brown*, 8 Bing. 33. *Tatton* v. *Wade*, 18 C. B. 371. *Swann* v. *Phillips*, 8 Ad. & E. 457.

(*d*) *Devaux* v. *Steinkeller*, 8 Sc. 202.

(*e*) *Pewtriss* v. *Austen*, 6 Taunt. 522.

(*f*) *Morison* v. *Salmon*, 2 Sc. N. R. 449. *Crawshay* v. *Thompson*, 4 M. & Gr. 357; 5 Sc. N. R. 562. *Rodgers* v. *Nowill*, 5 C. B. 109. *Blofeld* v. *Payne*, 4 B. & Ad. 410. *Sykes* v. *Sykes*, 3 B. & C. 541.

assumption of agency and of authority to order goods on behalf of a named principal.

Declarations for breach of warranty on the sale of a horse set forth "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the horse to the plaintiff, yet the said horse was not then sound and quiet to ride" (*g*). A declaration which stated, that in consideration that the plaintiff, at the request of the defendant, had bought a horse of the defendant, the defendant promised that the horse was sound, was held bad in arrest of judgment, as setting forth a warranty after a sale, and not a sale founded upon and induced by a warranty (*h*).

Declaration against a party who has contracted as agent without authority. —Where a declaration stated that the defendant, having been employed to superintend the erection of a church, falsely and fraudulently represented that he was authorised by the Rev. Thomas Ireland to order, and did order, stone of the plaintiffs for the building of the said church, on account of the said Rev. Thomas Ireland and others, the committee for building, &c., and that the plaintiffs, relying on that representation, delivered the stone, and the same was used in the building of the church, and the defendant was not, as he well knew, authorised to order the stone, and the said Rev. Thomas Ireland having refused to pay for the stone, the plaintiffs, trusting in the said representation, sued the said Rev. Thomas Ireland for the price of the stone, who defended the action, and obtained a verdict on the ground that he had never authorised the defendant to order the stone, by reason whereof the plaintiffs lost the price of the stone, and had to pay a large sum of costs, it was held that the declaration disclosed a good cause of action (*i*).

Declaration by an agent against a principal for a false representation.— Where a declaration stated that the defendant, being possessed of certain cattle, represented to the plaintiff that he, the defendant, was entitled to sell the said cattle, and requested the plaintiff to put them up to auction, and the plaintiff, confiding in the representation, sold the cattle by auction, and, after deducting the expenses of the sale, paid over the purchase-money to the defendant, whereas the defendant was not entitled to sell the cattle, and afterwards the true owner brought an action against the plaintiff, and recovered 1100*l.* damages and 95*l.* costs, which the plaintiff was obliged to pay, together with 300*l.*, his own costs of defending the action, whereupon the plaintiff requested the defendant to pay him the amount of the said damages and costs, but the defendant refused, it was held that the declaration disclosed a good cause of action (*k*).

(*g*) 15 & 16 Vict. c. 76, Sched. B.
(*h*) *Roscorla* v. *Thomas*, 3 Q. B. 236. Holt, C. J., *Lysney* v. *Selby*, 2 Ld. Raym. 1120.
(*i*) *Randell* v. *Trimen*, 18 C. B. 786.
(*k*) *Adamson* v. *Jarvis*, 4 Bing. 69; 12 Moore, 241.

Declarations for fraudulently misrepresenting the financial condition of a joint-stock company show a good cause of action by setting forth that the defendant was a director of the company, the shares of which were transferable, and that the defendant, intending to deceive the plaintiff, fraudulently represented to the plaintiff that the company was then in a flourishing condition, and the profits realised during the half year ending, &c., would fairly allow of a dividend at the rate of 5*l.* per cent per annum, to be paid out of such profits to the shareholders, and that the plaintiff, relying upon the representation, bought shares in, and became liable to contribute to the losses of, the company; whereas the company was not, at the time the representation was so made by the defendant, in a flourishing condition, but was insolvent, and the profits realised by the company during the said half year would not fairly allow of the said dividend, nor of any dividend, to be paid to the shareholders, and that the dividend had not been paid out of the profits of the said company, but out of capital, as the defendant well knew at the time he so falsely represented as aforesaid, &c., showing that the plaintiff lost the value of his shares, and was obliged to contribute to the losses of the company, and claiming damages (*l*).

Of the plea of Not guilty.—Where an action was brought against the defendant for selling a certain lease, and certain fixtures and goodwill, for a larger price than they were worth, by means of a false and fraudulent representation, it was held that the plea of Not guilty put in issue the sale by means of the fraudulent representation, and that the plaintiff was bound to prove both the sale and the misrepresentation (*m*). And where the wrongful act complained of was, that the defendant represented himself to be the agent of the master of a vessel, and thereby induced the plaintiffs to enter into a charter-party with him, when in fact he was not such agent, and had no authority to charter the vessel, it was held that the plea of Not guilty put in issue both the fact of the misrepresentation and the fact of the making of the charter-party, the two facts together constituting the cause of action (*n*). Where the scienter is the gist of the action, it is put in issue by the plea of Not guilty (*o*).

Under the plea of Not guilty, the defendant may show that the representation is within the statute 9 Geo. 4, c. 14, s. 6 (ante, p. 740), and that it was not made by writing signed by the defendant (*p*).

Of the plea of infancy.—The plea of infancy is a good defence to an action for fraudulent representation and deceit. Thus it has been held that an infant is not responsible for falsely affirming goods to be his own

(*l*) *Scott* v. *Dixon*, 29 Law J., Ex. 62, n. *Bedford* v. *Bagshaw*, ante, p. 741. *Gerhard* v. *Bates*, 2 Ell. & Bl. 489.

(*m*) *Mummery* v. *Paul*, 1 C. B. 326.

(*n*) *Brink* v. *Wingaard*, 2 C. & K. 657.

(*o*) *Thomas* v. *Morgan*, 2 C. M. & R. 498.

(*p*) *Turnley* v. *Macgregor*, 6 M. & Gr. 46.

goods, and that he had a right to sell them, and thereby inducing the plaintiff to purchase them (*q*); nor for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to lend him a sum of money (*r*).

Proof of fraudulent misrepresentation and deceit.—"It is settled law," observes Parke, B., "that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the strength of it, and to alter his position to his damage (*s*). In order, therefore, to maintain an action for deceit arising from a false and fraudulent misrepresentation, it must be proved either that the defendant knew his statement to be untrue (ante, p. 737), or that he pretended to a knowledge which he must have known that he did not possess at the time he made the representation (ante, p. 739), or that he stated a fact to be true for a fraudulent purpose (*t*), and that he made it with the intention that the plaintiff should, either directly or indirectly, come to the knowledge of it, and act upon it. If the deceit consists in the fraudulent concealment of matters which were known to the defendant, and ought to have been disclosed to the plaintiff, the circumstances creating the right of the plaintiff to the information, and imposing upon the defendant the duty of giving it, must be clearly proved (ante, pp. 755–777).

Proof of the representation having been made to the plaintiff.—Public announcements and representations issued by the authority and under the direction of the directors or managers of public companies, and intended by them for general circulation in share-markets, and amongst purchasers of shares, are deemed in contemplation of law, as we have seen, to be made to all who desire to have dealings with the company, and to become purchasers of shares. The allegation in a declaration that the representation was made to the plaintiff is completely proved by showing that it was contained in a report or prospectus, published by the defendants, and sold or distributed by them for the purpose of influencing the sale of shares, and being perused by persons desirous of buying shares, and that the plaintiff perused it, and was induced by the statements and representations contained in it to buy shares (*u*).

Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.—"Cases frequently occur in which, upon entering into contracts, misrepresentations made by one party are not in any degree relied upon by the other party. If the party to whom the

(*q*) *Grove* v. *Nevill*, 1 Keb. 778.

(*r*) *Johnson* v. *Pye*, 1 Sid. 258. *Price* v. *Hewett*, 8 Exch. 146. *Liverpool, &c.* v. *Fairhurst*, ante, p. 30. *Bartlett* v. *Wells*, ante, p. 755.

(*s*) *Thom* v. *Bigland*, 8 Exch. 731. *Childers* v. *Wooller*, 8 W. R. 321.

(*t*) *Taylor* v. *Ashton*, 11 M. & W. 415.

(*u*) *Scott* v. *Dixon*, 29 Law J., Exch. 62, n. *Bedford* v. *Bagshaw*, ib. 64; ante, p. 741.

representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to render it incumbent upon a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance upon the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill (ante, p. 744), it is not easy to presume that representations made by one would have much influence upon the other" (*x*).

Cases frequently occur in which it appears that a contract was entered into after erroneous representations made by one party, and yet without the other party having at all relied upon those erroneous representations (*y*).

In an action for damages for a false representation by the defendant that he was authorised to accept a bill of exchange in the name of a public company, and to bind the company by the acceptance, the plaintiff must prove that he has sustained some actual pecuniary damage from the false representation. The mere fact of the bill coming into the plaintiff's hands does not *per se* import damage, as the plaintiff may have received the bill without having given any consideration for it (*z*).

Proof of warranties.—Although a warranty made orally on the completion of a written contract cannot be introduced as part of the contract, if the contract is silent as to the fact of the warranty (*a*), yet, if it can be shown that the warranty or representation was false to the knowledge of

(*x*) The Master of the Rolls, *Clapham* v. *Shillito*, 7 Beav. 149.

(*y*) *Shrewsbury* v. *Blount*, 2 Sc. N. R. 594. Holt, C. J., *Lysney* v. *Selby*, 2 Ld. Raym. 1120.

(*z*) *Eastwood* v. *Bain*, 3 H. & N. 738; 28 Law J., Exch. 74; 7 W. R. 90.

(*a*) Addison on Contracts, 5th edn. pp. 235, 236.

the party making it, and therefore fraudulent, it may be given in evidence as a circumstance collateral to the contract, and may be made the foundation of an action for deceit (*b*): for wherever a written contract or undertaking has been procured through the medium of falsehood and fraud, the fact may be proved by oral testimony, notwithstanding the existence of a writing embodying the terms of the bargain, but making no mention of the false representation (*c*).

An unstamped written agreement may be given in evidence to prove fraud, if it is used merely for the purpose of showing that a person paying money has been imposed upon (*d*).

Proof of terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.— If in an auction-room, or at a repository established for the sale of horses, the rules or conditions of sale are painted up in legible characters in a conspicuous position, the purchaser will be deemed to have had notice of the regulations, and will be bound by them, unless the vendor has resorted to some misrepresentation or contrivance to prevent the purchaser from reading them. And if by these rules or conditions of the sale it is stipulated that a warranty of soundness shall remain in force for a given period only, unless in the meantime a certificate of unsoundness is procured from a veterinary surgeon, the purchaser must comply with the stipulation, or lose his remedy upon the warranty (*e*).

Evidence of breach of warranty of a horse — What constitutes unsoundness.— "The rule as to unsoundness," observes Parke, B., "is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound. I think the word 'sound' means, that the animal is free from disease at the time he is warranted. If we once let in considerations of the slightness of the disease and facility of cure, where are we to draw the line? A horse may have a cold, which may be cured in a day; or a fever, which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionally so, and so also ought to be the damages" (*f*). Convexity of the cornea, rendering a horse short-sighted and causing him to shy, is unsoundness (*g*). It is not enough for the plaintiff to give

(*b*) *Dobell* v. *Stevens*, 3 B. & C. 623. *Meyer* v. *Everth*, 4 Campb. 22. *Wright* v. *Crookes*, 1 Sc. N. R. 685. *Hutchinson* v. *Morley*, 7 Sc. 341. *Canham* v. *Barry*, 15 C. B. 597; 24 Law J., C. P. 100.

(*c*) *Davis* v. *Symonds*, 1 Cox, 405.

(*d*) *Holmes* v. *Sixsmith*, 7 Exch. 807.

(*e*) *Bywater* v. *Richardson*, 1 Ad. & E. 508. *Mesnard* v. *Aldridge*, 3 Esp. 271.

(*f*) *Kiddell* v. *Burnard*, 9 M. & W. 669.

(*g*) *Holyday* v. *Morgan*, 28 Law J., Q. B. 9.

evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt he is not entitled to recover (*h*).

Proof of manifest defects not covered by the warranty.—If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty (ante, pp. 744, 745). If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoe so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty (*i*). The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame (*k*). A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect (ante, p. 745); but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal (*l*).

Proof of vice.—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term vice" (*m*).

Proof of the use of counterfeit trade-marks.—In actions for damages for the fraudulent use by the defendant of the plaintiff's trade-mark, it is necessary to prove that the plaintiff, being a manufacturer, has been accustomed to use a certain mark to denote that the goods so marked were of his manufacture, that such mark was well known and understood in the particular trade, and that the defendant had adopted the mark, and sold goods bearing such mark upon them, as and for the plaintiff's goods, with intent to deceive (*n*). It must be proved that the mark closely resembled the plaintiff's mark, and that it was used by the defendant

(*h*) *Eaves* v. *Dixon*, 2 Taunt. 343.
(*i*) Alderson, J., *Dickinson* v. *Follett*, 1 Mood. & Rob. 300.
(*k*) *Brown* v. *Elkington*, 8 M. & W. 132.
(*l*) *Holyday* v. *Morgan*, 28 Law J., Q. B. 0.
(*m*) *Scholefield* v. *Robb*, 2 Mood. & Rob. 210.
(*n*) Wilde, C. J., *Rodgers* v. *Nowill*, 5 C. B. 125.

to enable him to pass off his own goods as being of the plaintiff's make (*o*).

Remedies in equity for a false representation.—Where a false representation is made by one man to induce another to enter into a contract, and the party making the representation is no party to the contract, the Court of Chancery will compel the latter to make good his assertion as far as possible. The principle of equity, that where a party by misrepresentation draws another into a contract, such party shall be compelled, if possible, to make good the representation, applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known, and ought to have remembered, the fact which negatives the representation (*p*).

Of the damages recoverable in actions for fraudulent misrepresentation and deceit.—Damages are, as we have seen, recoverable from every defendant who has knowingly made a false statement to the plaintiff, with an intention that he should act upon it in reliance upon its truth, and the plaintiff has acted upon it, and been damnified; for "wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequence of the misrepresentation" (*q*). Damages also are recoverable, as we have seen, from persons who represent that to be true within their own knowledge which they do not know to be true, and so induce others to act upon the faith of the representation, and sustain damage (ante, pp. 739, 744), more particularly in those cases where the means of knowing the truth of the matter rests peculiarly or exclusively with the parties making the representation (ante, pp. 743, 745). If a man assumes to be an agent when he is not so, he must answer for any damage which is the natural and direct result of confidence being given to the representation of authority. If he believed that he had authority to contract as agent when he had not, he is answerable for the consequences in an action of contract. If he knew that he had no authority, he is then responsible in an action for deceit (*r*). All special damages, which are the natural result of fraudulent misrepresentation and deceit, are recoverable from the defendant, if the plaintiff has claimed them in his declaration (post, p. 771).

Special damages — Breach of warranty.—If special damages have been sustained by reason of the misrepresentation and deceit, or breach of war-

(*o*) *Crawshay* v. *Thompson*, 4 M. & Gr. 387; 5 Sc. N. R. 562. *Morison* v. *Salmon*, 2 Sc. N. R. 452.

(*p*) *Pulsford* v. *Richards*, 17 Beav. 94.

(*q*) *Pasley* v. *Freeman*, 3 T. R. 65; ante, pp. 22, 737.

(*r*) *Collen* v. *Wright*, 7 Ell. & Bl. 314. *Randell* v. *Trimen*, 18 C. B. 786; 25 Law J., C. P. 307. *Simons* v. *Patchett*, 7 Ell. & Bl. 568; 26 Law J., Q. B. 195.

ranty of a vendor, they may be recovered from the latter, if the plaintiff has claimed them in his declaration. Where a cable was warranted sound, and a purchaser, relying on the warranty, attached an anchor to the cable, and the cable was unsound, and broke, and the purchaser lost his anchor, it was held that the value of the anchor might be recovered in addition to the price paid for the cable, but that the plaintiff must expressly claim it in his declaration of his cause of action (*s*). But the damages must be such as may fairly and reasonably be considered in the ordinary course of things to be the probable result of the plaintiff's acting on the faith of the representation or warranty. If there are special circumstances rendering the misrepresentation or deceit peculiarly injurious to the plaintiff, the defendant will not in general be responsible for the increased damages resulting therefrom, unless the special circumstances were known to him at the time of the making of the representation (*t*).

False assumption of agency—Special damages.—Where the defendant, a land agent, professed that he had, and supposed that he had, authority from a landlord to let an estate, and thereupon entered into an agreement in writing with the plaintiff, whereby he professed to bind the landlord to grant the plaintiff a lease of the estate for twelve years, and the plaintiff, supposing that the defendant had the authority he pretended to have, entered upon the land, and bought and paid for the straw and muck, and expended considerable sums in preparing the land for cultivation, and the landlord then refused to grant the lease on the ground that the defendant was not authorised to let the land on the terms of the agreement, and the plaintiff, relying on the representation of authority that had been made by the defendant, instituted a suit in the Court of Chancery to enforce a specific performance of the agreement, and gave notice to the defendant of the institution of the suit, and that the landlord defended on the ground that the defendant had no authority to sign the agreement on his behalf, and that if the suit failed from want of authority the plaintiff would look to the defendant for costs, and the defendant did not withdraw his assertion of authority, but said he would resist any demand the plaintiff might have against him, and the suit went on, and it was established that the defendant had no authority to let the land on the terms specified, and the plaintiff had to pay the costs of the suit, it was held that he was entitled to recover these costs from the defendant, as well as the expenses he had incurred in preparing the land for cultivation (*u*).

Prevention of fraud by indictment.—All deceitful practices for defrauding, or endeavouring to defraud, another of his just rights by means of

(*s*) *Borradaile* v. *Brunton*, 2 Moore, 582; 8 Taunt. 535. As to damages recoverable for breach of warranty, see Addison on Contracts, pp. 1059–1062.

(*t*) *Hadley* v. *Baxendale*, 9 Exch. 341; 23 Law J., Exch. 179. *Portman* v. *Middleton*, 4 C. B., N. S. 322; post, ch. 22, s. 1.

(*u*) *Collen* v. *Wright*, 8 Ell. & Bl. 647; 26 Law J., Q. B. 147; 27 ib. Exch. 217.

some artful device, or fraudulent contrivance, are punishable as misdemeanours at common law. Persons have been indicted and convicted for playing with false dice; also for causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written; also for persuading a woman to execute writings on her marriage as being a settlement of her property upon her, but which constituted an acknowledgment of a debt with a warrant of attorney to enter up judgment (*x*). Where a man went about the country and offered blacking for sale as "Everett's Premier," representing it to be a well-known article of that name, but knowing that it was not so, and intending to cheat his purchasers by palming off upon them a spurious article as the true one, it was held that he was indictable for a misdemeanour (*y*).

Indictments for obtaining, or endeavouring to obtain, money or goods by false pretences.—Shopkeepers also have been indicted and convicted for obtaining, or endeavouring to obtain, money from their customers by false pretences, by preparing and selling spurious articles fraudulently represented by them to be genuine, in order that by means of the counterfeit they might obtain the price of the genuine article. This was the case where a tradesman prepared some baking powders of his own manufacture, and put them into printed wrappers and represented them to be the baking powders of a celebrated manufacturer, and sold them, and received the money for them as such (*z*); where a shopkeeper obtained the price of silver for base metal, by knowingly and fraudulently representing an article of base metal sold by him to be silver (*a*); where dealers in wares and merchandise had knowingly and fraudulently misrepresented the quantity or weight of articles of merchandise delivered by them, to the order of a purchaser, for the purpose of obtaining, or who had thereby obtained, from such purchaser the price of a larger quantity of goods than had been actually delivered (*b*).

But a mere misrepresentation, at the time of a sale, of the quality of the goods sold, if it amounts only to a vaunting or exaggerating statement of the value of the article — the high-flown praise often bestowed by a vendor on the wares he sells — will not amount to an indictable offence (*c*).

Various statutes have been passed for the repression of fraud, and the punishment of persons who obtain money, goods, or securities under false pretences (*d*); but "these statutes," observes Pollock, C. B., "were never,

(*x*) Hawkins' Pleas of the Crown, ch. 71.
(*y*) *Reg.* v. *Dundas*, 6 Cox, Cr. C. 380.
(*z*) *Reg.* v. *Smith*, 26 Law J., M. C. 105.
(*a*) *Reg.* v. *Roebuck*, 25 Law J., M C. 101.
(*b*) *Reg.* v. *Sherwood*, 26 Law J., M. C. 81. *Reg.* v. *Ragg*, 1 Bell, C. C., 214. *Reg.* v. *Eagleton*, Dears. C. C. 515.
(*c*) *Reg.* v. *Bryan*, 1 Dears. & B., C. C. 265.
(*d*) 24 & 25 Vict. c. 96, s. 88.

in my opinion, meant to apply to a mere fraud committed in the course of a mercantile transaction, and to make it the subject of an indictment, unless the matter was really and wholly a designed piece of swindling " (*e*).

Prevention by indictment of the fraudulent use of trade-marks.—Every person who, with intent to defraud, or to enable another to defraud, forges, counterfeits, or causes to be forged or counterfeited, any trade-mark, or applies, or causes to be applied, any trade-mark, or any forged or counterfeited trade-mark, to any chattel or article, not being the manufacture, &c., of any person denoted, or intended to be denoted, by such trade-mark, or by such forged or counterfeited trade-mark, or not being the manufacture, &c., of any person whose trade-mark shall be so forged or counterfeited, or who applies, or causes to be applied, any trade-mark, or forged or counterfeited trade-mark, to any chattel or article, not being the particular or peculiar description of manufacture, &c., denoted, or intended to be denoted, by such trade-mark, or by such forged or counterfeited trade-mark, is made guilty of a misdemeanour.

Every person, also, who with intent to defraud, or to enable another to defraud, applies, or causes to be applied, any trade-mark, or forged or counterfeited trade-mark, to any cask, bottle, case, cover, &c., or other thing, in, on, or with which any chattel or article shall be intended to be sold, or shall be sold, or uttered, or exposed for sale, or intended for any purpose of trade or manufacture, or encloses or places any chattel or article, or causes the same to be enclosed or placed in, upon, under, or with, any cask, bottle, case, cover, &c., or other thing, to which any trade-mark shall have been falsely applied, or to which any forged or counterfeited trade-mark shall have been applied, or applies or attaches, or causes to be applied or attached, to any chattel or article, any case, cover, &c., or other thing, to which any trade-mark shall have been falsely applied, or to which any forged or counterfeited trade-mark shall have been applied, or encloses, places, or attaches any chattel or article, or causes it to be enclosed, placed, or attached in, upon, under, with, or to any cask, bottle, case, cover, &c., or other thing, having thereon any trade-mark of any other person, is made guilty of a misdemeanour.

In every indictment and proceeding against any person for any misdemeanour, or other offence against the provisions of the statute, it is sufficient to allege an intent to defraud, or to enable some other person to defraud, without alleging an intent to defraud any particular person; and on the trial of any indictment, or information, &c., it is sufficient to prove that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

(*e*) *Reg.* v. *Evans*, 32 Law J., M. C. 38.

Every person who aids, abets, counsels, or procures the commission of any offence which by the act is made a misdemeanour, is also to be adjudged guilty of a misdemeanour (*f*).

Injunction to prevent fraud.—Whenever a person has been injured in his trade or business, or has sustained some special or peculiar injury from a fraud committed by another, he is entitled to an injunction to prevent the continuance of the injury as well as to compensation in damages. But the court will not lend its assistance for the purpose of preventing mere falsehood, not interfering with the rights of another. It will not, therefore, restrain a tradesman from putting a false statement upon the goods he sells, such as a representation that they had obtained a prize-medal, when no such medal had ever been obtained (*g*).

Fraud on the public affords no ground for a plaintiff coming into a court of equity for an injunction where he has himself no interest in the subject-matter by which the fraud is committed. In these cases, the suit must be at the instance of the attorney-general (*h*).

Injunction to prevent the fraudulent use of trade-marks.—There is no property whatever in a trade-mark, but a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it. Where the mark denotes that articles so marked are manufactured by a particular person, and another person puts the same mark on his own goods, this is a fraud upon the original manufacturer who first used the mark, and on purchasers who buy the goods under the impression that they are manufactured by the person whose mark they bear; and this fraud may be redressed by injunction in this country, if it is committed here (*i*), whatever may be the country of the manufacturer who has been defrauded (*k*), and although the marks have been used in ignorance, and under the belief that they were merely fancy decorations (*l*). Where the trade-mark has been used with the knowledge of its being the distinctive device of another manufacturer, the court will, in addition to an injunction against the future use of it, decree an account of profits, and compensation in respect of the past use after knowledge of the prior right (*m*).

A trade-mark may be of the greatest possible value, even though in reality it may not affect the quality of the article on which it is impressed. It may either indicate that the article was made by a particular person or firm, and so serve as a guarantee for its excellence; or it

(*f*) 25 & 26 Vict. c. 88, ss. 2, 3, 12.
(*g*) *Batty* v. *Hill*, 11 W. R. 745.
(*h*) *Hall* v. *Barrows*, 9 Jur. N. S. 483.
(*i*) *Holloway* v. *Holloway*, 13 Beav. 213. *Franks* v. *Weaver*, 10 ib. 303.
(*k*) *Collins' Co.* v. *Brown*, 3 Kay & J. 428. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 W. R. 931.
(*l*) *Millington* v. *Fox*, 3 Myl. & Cr. 338. *Cartier* v. *Carlile*, 8 Jur. N. S. 183.
(*m*) *Edelston* v. *Edelston*, 9 Jur. N. S. 479. *Leather Cloth Co.* v. *American Co.*, 11 W. R. 933.

may have a merely capricious value, as where the article is intended to be sold in a place where the brand is known, and from mere inveteracy of habit people choose to go on purchasing those articles only of the kind which are marked in that particular way, and to which they have always been accustomed (*n*).

The principle upon which courts of law and equity proceed in granting relief and protection in cases of this sort is, that a man ought not to sell his own goods under the pretence that they are the goods of another man, and ought not to be permitted to practise such a deception, nor to use the means which contribute to that end. He is not, therefore, allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person (*o*).

Two things are requisite to be proved to establish a fraud of this description. First, there must be such a general resemblance by one man of the trade-mark of another as to mislead the public. And, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the wrong-doer himself the benefit of the deception which the general resemblance is calculated to produce (*p*).

If it is found that the defendant is manufacturing printed labels which the plaintiff alone has a right to use, and the use of which on any goods not manufactured by the plaintiff would be a fraud on the plaintiff, the court will, at the instance of the latter, interfere by injunction to prevent the printing, manufacturing, and selling of such labels, and will not hold back until the whole fraud is brought to a completion by the sale of spurious goods with the spurious trade-marks affixed (*q*). The equitable interference of the court is founded on its jurisdiction to give relief in the shape of preventive justice, in order to protect and make more effectual a legal right, and "protect property from that which, if completed, would give a right of action (*r*).

Where the plaintiff started omnibuses with particular words and devices marked upon them, an injunction was granted restraining the defendant from starting opposition omnibuses having the same words and devices marked upon them, so as to make it appear that the defendant's omnibuses belonged to, and were under the management of, the plaintiff (*s*).

Where manufacturers have introduced a rare or superior article, and have given it a new name, by which it is known in the market, the court

(*n*) *Hopkins* v. *Hitchcock*, 32 Law J., C. P. 154.

(*o*) *Perry* v. *Truefitt*, 6 Beav. 73. *Dixon* v. *Fawcus*, 30 Law J., Q. B. 137. *Dent* v. *Turpin*, *Tucker* v. *Turpin*, 2 Johns. & Hem. 139; 30 Law J., Ch. 495.

(*p*) *Croft* v. *Day*, 7 Beav. 84.

(*q*) *Farina* v. *Silverlock*, 24 Law J., Ch. 694; 26 ib.; 6 De G. M. & G. 214.

(*r*) *Emperor of Austria* v. *Day*, 30 Law J., Ch. 706. *Edelston* v. *Edelston*, 9 Jur. N. S. 479.

(*s*) *Knott* v. *Morgan*, 2 Keen, 219.

will restrain another manufacturer from bringing out a similar article, and calling it by the same name (*t*). "The court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and although sometimes, in a very strong case, it interferes in the first instance by injunction, yet in a general way it puts the party upon asserting his right by trying it before a jury. If it does not do that, it permits the plaintiff, notwithstanding the suit in equity, to bring an action. In both cases, the court is only acting in aid of, and as ancillary to, the legal right, and will not, therefore, at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title" (*u*).

Where a trade-mark, the property of a partnership, has been used to denote the place where a particular article is manufactured by them, it constitutes, as between the surviving partner and the estate of a deceased partner, a portion of the good-will attaching to the spot where the business is carried on; but where it is used to denote the persons by whom the article is manufactured, the exclusive right of using it becomes vested in the surviving partners (*x*).

Where any particular article derives its celebrity from the place where it is grown or manufactured, such as wine made from a particular vineyard, a sale of the property would carry with it a right to the use of a trade-mark known in the market as denoting the growth of that particular property (*y*).

The assignee of a trade-mark may assign to another the right to use the mark in common with himself, or he may assign the exclusive use of it, covenanting that he will not use it himself (*z*).

(*t*) *Braham* v. *Bustard*, 9 L. T. R., N. S. 199; 11 W. R. 1061.

(*u*) Ld. Cottenham, *Motley* v. *Downman*, 3 Myl. & Cr. 1. *Collins' Co.* v. *Reeves*, 28 Law J., Ch. 56.

(*x*) *Hall* v. *Barrows*, 32 Law J., Ch. 548; 9 Jur. 483.

(*y*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 W. R. 931.

(*z*) *Bury* v. *Bedford*, 11 W. R. 973; ante, p. 81.

CHAPTER XIX.

OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY, AND SEDUCTION.

SECTION I.—*Of infringements of matrimonial and parental rights.*—Rights of wives deserted by their husbands—Restitution of conjugal rights—Judicial separation—Cruelty and desertion—Revival of condoned cruelty—What amounts to desertion without cause—Rights of married women after a decree for a judicial separation—Alimony—Adultery and dissolution of the marriage contract—Adultery and desertion on the part of the husband—Wilful neglect or misconduct conducing to adultery—Connivance—Condonation of adultery—Alimony on dissolution of marriage—Orders for settlement of property for the benefit of the innocent party and children—Power of the Divorce Court over marriage-settlements—Orders respecting the custody of children—Right of fathers and guardians to the custody of infant children—Control over this right exercised by the courts—Custody of children of British subjects born abroad—Custody of children of foreigners—Right of mothers to the custody of children under seven years of age—Obligation of parents to provide for children—Proceedings before the Divorce Court—Evidence on the hearing of petitions—Competency of the husband and wife to give evidence—Evidence of co-respondents—Mode of taking evidence—Appeal—Trial of questions of fact before a jury—Petitions for damages from adulterers—Pleadings thereon—Evidence—Proof of marriage—Damages recoverable—Application thereof.

SECTION II.—*Of seduction.*—Harbouring of married women—Seduction and loss of service of servants, daughters, and wards—Pretended hiring of girls for purposes of seduction—Seduction of married daughters—Effect of proof that the defendant, though he seduced the girl, was not the father of her child—Effect of proof of the seduction having been occasioned by the plaintiff's neglect of his parental duties—Parties to actions for seduction—Pleadings, defences, and evidence—Damages recoverable—Indictments for the abduction of unmarried girls under age.

SECTION I.

OF THE INFRINGEMENT OF MATRIMONIAL AND PARENTAL RIGHTS.

Rights of wives deserted by their husbands.—A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the

country, to justices in petty sessions, or in either case to the Divorce Court, or the judge ordinary thereof, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of the desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of the desertion from her husband, and all creditors and persons claiming under him; and such earnings and property will belong to the wife as if she were a *feme sole:* but every such order, if made by a police-magistrate or justices at petty sessions, must, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and the husband, and any creditor or other person claiming under him, may apply to the court, or to the magistrate, or justices by whom such order was made, for the discharge thereof. If the husband, or any creditor of, or person claiming under the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he may be compelled, at the suit of the wife, to restore the specific property, and also a sum equal to double the value of the property so seized or held after such notice as aforesaid.

Right of action of married women after they have obtained an order for protection.—When an order of protection has been made, the wife, during the continuance thereof, is in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree of judicial separation. These provisions extend to property to which the wife becomes entitled as executrix, administratrix, or trustee (*a*). It has been held that a retrospective effect cannot be given to this order—so far as it affects the rights and liabilities of third parties—and, therefore, if a married woman commences an action after the desertion of her husband, but before she has obtained an order, the subsequent procurement of the order cannot make valid the invalid proceeding, for it would lead to incalculable mischief if the words of the statute were construed to have that effect as regards third parties (*b*).

The affidavit in support of an application to the Divorce Court for an order under this section of the statute, should state circumstances sufficient to satisfy the court of the fact of the desertion. It should set out the time of the husband's going away, and state whether the wife has had any subsequent communication with him, and if so, the nature of that

(*a*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 6, 7.

(*b*) *Mid. Rail. Co.* v. *Pye*, 30 Law J., C. P. 315; 10 C. B., N. S. 179.

communication, whether she knows where he is or what he is doing, and whether she has received any money from him, or any promise to contribute to her support, or to return to her (*c*).

What amounts to desertion.—Desertion, under s. 21 of the Divorce Act, means not only that the husband has absented himself from his wife, but has left her unprovided for; and such desertion must continue at the time of making the order, so that a *bonâ-fide* offer on the part of the husband to return and provide for his wife would take away her right to have the order made (*d*).

A married woman, whose earnings and property have been protected against her husband and his creditors by an order made under s. 21, on account of his desertion of her, may obtain an order from the Court of Chancery for the payment of a legacy given to her in general terms (*e*).

Of the restitution of conjugal rights.—By 20 & 21 Vict. c. 85, s. 17, it is enacted, that applications for the restitution of conjugal rights may be made either to the Court for Divorce and Matrimonial Causes, or to any judge of assize at the assizes; but by 21 & 22 Vict. c. 108, s. 19, so much of this last-named statute as authorises application for a restitution of conjugal rights or for judicial separation, to be made to a judge of assize, is repealed.

The court may compel the man and wife to live under the same roof, but it cannot constrain them to have intercourse with each other, nor to live together on terms of conjugal affection (*f*). A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take his wife home, is bound to take the first step by inviting her to return to him. If he does not, an attachment will be issued (*g*).

The doctrine of the canon law, that where husband and wife have both been guilty of adultery, there is *compensatio criminum*, and both are restored to the position of innocent parties, forms no part of the law of England. A suit, therefore, for the restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery (*h*).

Of judicial separation on the ground of adultery, cruelty, or desertion.—By the statute 20 & 21 Vict. c. 85, s. 7, divorce *a mensâ et thoro* is abolished, and in lieu thereof the Court for Divorce and Matrimonial Causes is authorised to pronounce a sentence of judicial separation between husband and wife, which may be obtained (s. 16) either by the husband

(*c*) *Sewell, ex parte*, 28 Law J., Prob. & Matr. 8.
(*d*) *Cargill* v. *Cargill*, 27 ib. 70.
(*e*) *Re Kingsley*, 28 Law J., Ch. 80.
(*f*) Shelford's Marriage and Divorce. Rogers's Eccles. Law.
(*g*) *Alexander* v. *Alexander*, 30 Law J., Prob. & Matr. 173.
(*h*) *Hope* v. *Hope*, 27 ib. 43.

or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards (*i*).

If a husband refuses his wife the common necessaries of life, or treats her with gross insult and indignity; if he spits in her face, attempts to debauch her maid-servants (*k*), or puts her unnecessarily into confinement, or under personal restraint; or strikes her, or threatens her with personal violence unjustifiably, and without adequate provocation (*l*), and conducts himself so as to give her a reasonable apprehension of bodily harm if she continues to reside with him, he is guilty of cruelty, and entitles her to separation of bed and board (*m*). "Everything," observes Sir William Scott, "is, in legal construction, cruelty, which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife is to be protected. It is not necessary to inquire from what motive the treatment proceeds. Nor is it necessary that the conduct of the wife should be entirely without blame, for the imputation of blame to the wife will not justify the ferocity of the husband. Constant insult, constant vituperation, and charges of gross offences, made in the presence of the wife and before her friends, servants, or strangers, and such injurious treatment as renders life unbearable, constitute good grounds for a separation, but mere turbulence of temper and petulance of manners are not sufficient." The assistance of the court, moreover, will not be afforded to a wife "who has taken upon herself to avenge her own wrongs, and to maintain a contest of retaliation" (*n*).

Where it appeared that a married couple had for thirty years been continually quarrelling, and the wife petitioned for a judicial separation, the judge held that he had no power to separate them on that account; for married persons cannot be legally separated upon the disinclination of one or both of them to cohabit together leading to perpetual quarrels (*o*). "If a woman gets drunk, and loses her self-possession and uses violence, or attempts to destroy the property or stock in trade of her husband, he may employ as much violence as is necessary to protect his property or himself; but he goes too far if he follows her away, and strikes her after she has ceased her violence. The law gives a man no authority to beat a drunken wife" (*p*). Where a husband sought to get rid of a drunken and passionate wife, who destroyed his furniture, the judge said, "I must be cautious about opening the court to cases of this description. The

(*i*) *Brookes* v. *Brookes*, 28 Law J., Prob. & Matr. 38.

(*k*) Hag. Eccles. 776; Hetley, 149. *Saunders* v. *Saunders*, 1 Rob. Ec. R. 549.

(*l*) *Waring* v. *Waring*, 2 Phill. 132.

(*m*) *Gregory's* case, 4 Burr. 1901. *Lecte* v. *Lecte*, 31 Law J., Prob. & Matr. 121. *Waddell* v. *Waddell*, ib. 123.

(*n*) Hag. Consist. 458; 119, 304. *Paterson* v. *Paterson*, 3 H. L. C. 328. *Curtis* v. *Curtis*, 27 Law J., Prob. & Matr. 75.

(*o*) *Bostock* v. *Bostock*, 27 ib. 87.

(*p*) *Pearman* v. *Pearman*, 29 ib. 54.

wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing a judicial separation" (*q*).

Revival of condoned cruelty.—If cruelty has been condoned by the wife on condition that she is received back and restored to her proper position as a wife in her husband's household, and the condition is broken by the husband, the cruelty is revived, and the wife entitled to a judicial separation (*r*). Where there have been acts of violence followed by condonation, threats subsequently uttered of such a nature, and so expressed, as to satisfy the court that further cohabitation would be attended with danger to the party threatened, constitute a sufficient ground for a decree for a judicial separation (*s*).

What amounts to desertion without cause.—A husband who absents himself from his wife for the *bonâ-fide* purpose of obtaining employment, and continues absent with the concurrence of the wife, or without any communication to him of her disapproval of his absence, or any manifestation of a desire on her part for his return to her, cannot be said to have deserted her within the meaning of s. 16 of the Divorce Act. "I think it clear," observes the Judge Ordinary, "that to constitute desertion without cause by the husband, it must be shown that he has wilfully absented himself without cause from the society of his wife, and in spite of her wish, she not being a consenting party" (*t*). Desertion under this section means that the husband has absented himself, and has left his wife unprovided for; and such desertion must have continued for two years at the time of the making of the petition for a judicial separation, so that a *bonâ-fide* offer of the husband to return and provide for his wife and take her home, he having a home prepared for her, would take away her right to a judicial separation (*u*). But a mere vague intimation by the husband to the wife that she may rejoin him, not containing any definite offer of a home, will not deprive her of this right when once acquired (*x*).

Rights of married women after a decree for a judicial separation.—After a decree for a judicial separation, the wife has the legal status of a *feme sole* in respect of wrongs and injuries, and suing and being sued in any civil proceeding, and her husband is not liable in respect of any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant (*y*).

Alimony in cases of judicial separation.—The Divorce Court, after making a decree for a judicial separation, may also make a decree or

(*q*) *Scott* v. *Scott*, 29 Law J., Prob. & Matr. 64.
(*r*) *Cooke* v. *Cooke*, 32 ib. 81, 154.
(*s*) *Bostock* v. *Bostock*, 27 ib. 88.
(*t*) *Thompson* v. *Thompson*, 27 ib. 68.
Haviland v. *Haviland*, 32 ib. 65.
(*u*) *Cargill* v. *Cargill*, 27 ib. 69.
(*x*) *Cudlipp* v. *Cudlipp*, ib. 64.
(*y*) 20 & 21 Vict. c. 85, s. 26.

order for alimony, for her comfortable subsistence in accordance with her husband's income (*z*) and her own earnings, where she is supporting herself (*a*), and may (s. 24) direct the same to be paid either to the wife herself, or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient (*b*); and if alimony decreed, or ordered to be paid, is not duly paid, the husband will (s. 26) be liable for necessaries supplied to the wife.

Of adultery and the dissolution of the marriage contract.—Adultery was formerly an indictable, and for about ten years was *de facto* a capital, offence, being made so by a statute passed by the Rump Parliament, A.D. 1650 (*c*), after Charles the First had been beheaded, and the House of Lords voted useless and dangerous. This statute became a nullity at the Restoration, and adultery has since been held to be a mere civil injury and ground for divorce. The Divorce Act, 20 & 21 Vict. c. 85, s. 27, enacts, that a husband may petition the court for the dissolution of the marriage on the ground of adultery on the part of his wife, and the wife may petition for the dissolution of the marriage on the ground that her husband has been guilty of incestuous adultery, or of bigamy with adultery (*d*), or of rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro* (*e*), or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. But if it appears to the court that the petitioner has been in any manner accessory to, or conniving at, the adultery (*f*), or has condoned it (s. 29), or that the petition is presented or prosecuted in collusion with either of the respondents, the petition will (s. 30) be dismissed. And if in the opinion of the court the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated from the other party to the marriage before the adultery complained of, and without reasonable excuse (*g*), or of such wilful neglect or misconduct as has conduced to the adultery (*h*), it is competent to the court (s. 31) to refuse to dissolve the marriage. A suit for dissolution of marriage cannot be maintained against a lunatic on any ground whatever (*i*). But the committee of a

(*z*) *Hooper* v. *Hooper*, 30 Law J., Prob. & Matr. 49.

(*a*) *Goodheim* v. *Goodheim*, ib. 162.

(*b*) *Franks* v. *Franks*, 31 Law J., Prob. & Matr. 23. *Avila* v. *Avila*, ib. 176. *Fletcher* v. *Fletcher*, ib. 83.

(*c*) 2 Scobell's Acts, part 2, p. 121.

(*d*) *Horne* v. *Horne*, 27 Law J., Prob. & Matr. 50.

(*e*) Ante, p. 780. *Ward* v. *Ward*, 27 ib. 63. *Milner* v. *Milner*, 31 ib. 159.

(*f*) *Walton* v. *Walton*, 28 ib. 97. *Studdy* v. *Studdy*, ib. 105.

(*g*) *Coulthart* v. *Coulthart*, ib. 21.

(*h*) *Du Terraux* v. *Du Terraux*, ib. 95. *Cunnington* v. *Cunnington*, ib. 101. *Groves* v. *Groves*, ib. 108. *Haswell* v. *Haswell*, 29 ib. 21.

(*i*) *Bawden* v. *Bawden*, 31 ib. 94.

lunatic may maintain a suit for a judicial separation on the ground of the adultery of the wife of the lunatic (*k*).

Adultery and desertion on the part of the husband giving the wife a right to a dissolution of the marriage must, therefore, continue for two years or upwards without reasonable excuse. Where the husband on being reproached with his adulterous connexion, declared he would go away and live with his paramour, and his wife said, "Go, and when you are tired of her come back to me," and the husband took up his hat, but before he got out of the house his wife made him promise that he would return to her, but he never came back, and two years and upwards having elapsed the wife sued for a dissolution of the marriage, it was held that she had given no such assent or sanction to the desertion as disentitled her to a decree (*l*). A wife is not deprived of her right under s. 27 to a divorce on the ground of adultery coupled with desertion, for two years and upwards, by a subsequent offer on the part of the husband to return and cohabit with her (*m*).

Wilful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife.—The policy of the legislature seems to have been to deprive the husband of a remedy by divorce if he has misconducted himself as a husband, and has contributed to his own dishonour, not to punish neglect or misconduct unconnected with the relation of husband and wife. The neglect or misconduct of the husband, therefore, which disentitles him to a divorce, must be in his marital capacity, and a breach of some marital duty. If, therefore, the husband is convicted of felony and transported, and the wife, being deprived of the protection of her husband, then lives in adulterous intercourse with another man, the conviction and transportation of the husband do not constitute misconduct in the husband disentitling him to a divorce (*n*). So, where an infant under age, who had contracted a clandestine marriage with a prostitute, was sent out of the country by his guardians and prevented from communicating with his wife, and the wife relapsed into her old trade of prostitution, it was held that the involuntary desertion of the wife by the infant husband formed no bar to a suit by him for the dissolution of the marriage (*o*).

Connivance or toleration of adultery on the part of the husband will deprive him of his right to the dissolution of the marriage. If, therefore, a husband, finding that his wife has committed adultery, foregoes his claim to a divorce in consideration of a sum of money, not condoning the offence, but allowing her to remain his wife, and allowing his remedy to be barred by a verdict in favour of the respondent and co-respondent,

(*k*) *Woodgate* v. *Naylor*, 30 Law J., Prob. & Matr. 197.
(*l*) *Haviland* v. *Haviland*, 32 ib. 65.
(*m*) *Cargill* v. *Cargill*, 27 ib. 69.
(*n*) *Cunnington* v. *Cunnington*, 28 ib. 101.
(*o*) *Beavan* v. *Beavan*, 32 ib. 36.

he will be taken to have given a tacit consent to any future intercourse between her and her paramour. A man so acting withdraws his objection to the intercourse that has taken place, and sells his assent to the prostitution of his wife, and cannot afterwards complain of that of which he has himself sanctioned. A man consenting to adultery with A, but not consenting to adultery with B, cannot make the adultery with B a ground for a dissolution of the marriage. He cannot be heard to say *non omnibus dormio*, or *non semper dormio*. Such language and such conduct are not to be endured. Connivance, therefore, by the husband to any one act of criminal intercourse on the part of the wife, may deprive him of redress through the medium of a dissolution of the marriage for a subsequent act of adultery not tolerated or connived at by him (*p*). To establish connivance, it is requisite, not that the party conniving should be actually an accessory before the fact by doing anything to bring about the adultery, but that he should be cognizant that it would or must result from certain transactions that he approved of, and consented to (*q*). Mere negligence, mere inattention, mere dulness of apprehension, mere indifference, will not suffice, there must be an intention on the husband's part that the wife should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery, and the husband, intending and desiring such a result, refrains from interfering to prevent it, when he might have done so, he is guilty of connivance (*r*).

Condonation of adultery is forgiveness of the conjugal offence, with full knowledge of all the circumstances (*s*). "Judges of great eminence have said, that there is a great difference between what would constitute condonation of the adultery of the husband and what that of the wife; that conduct which would be considered culpable in a husband would be praiseworthy in a wife; that forgiveness on the part of the wife, in the hope of reclaiming her husband, would be meritorious, while a similar forgiveness by the husband would be dishonourable. Passages to this effect abound in the judgments of Lord Stowell and Sir J. Nicholl" (*t*). The forgiveness of a wife, which is to take away the husband's right to a divorce, must not fall short of reconciliation, and this must be shown by the reinstatement of the wife in her former position, so that subsequent conjugal cohabitation must be proved. Mere words of condonation, however strong, can only be regarded as imperfect forgiveness, and unless followed up by reconciliation and the reinstatement of the wife in the position she occupied before she transgressed, are incomplete, and do not

(*p*) *Gipps* v. *Gipps*, 32 Law J., Prob. & Matr. 78. *Lovering* v. *Lovering*, 3 Hagg. 87. *Crewe* v. *Crewe*, ib. 126.

(*q*) *Glennie* v. *Glennie*, 32 Law J., Prob. & Matr. 17. *Phillips* v. *Phillips*, 31 ib. 69. *Allen* v. *Darcy*, 30 ib. 4.

(*r*) *Allen* v. *Allen*, 30 ib. 4. *Marris* v. *Marris*, 31 ib. 69.

(*s*) *Dempster* v. *Dempster*, 31 ib. 20.

(*t*) The Judge Ordinary, *Peacock* v. *Peacock*, 27 ib. 71.

amount to legal condonation. There is no legal condonation where the act of forgiveness has not been accompanied or followed by conjugal cohabitation (*u*).

The fact of the adultery of one of the parties having been condoned is no bar to a petition for a divorce on account of adultery afterwards committed by the other (*x*), provided there has been no connivance in, or sanction of, the adulterous intercourse (*y*). The adultery of the wife, therefore, if it has been condoned by the husband, is no bar to a suit by her for a judicial separation on the ground of adultery subsequently committed by him (*z*).

Alimony in cases of dissolution of marriage.—After a decree for a dissolution of marriage, the court may (s. 32) order the husband to secure such a sum of money for the support of the wife as it may deem reasonable, having regard (s. 32) to the wife's fortune, the ability of the husband, and the conduct of the parties (*a*).

Orders for settlement of property for the benefit of the innocent party and children of the marriage, may be made to extend to the property of the wife, where a sentence of divorce or judicial separation has been founded on adultery committed by her (*b*).

Power of the Divorce Court over marriage-settlements.—By 22 & 23 Vict. c. 61, s. 5, it is enacted, that the court for divorce, &c., after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements, made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the court shall seem fit (*c*). Where there is no issue of the marriage, the court cannot vary or alter the marriage-settlements (*d*). The court will not, at the prayer of an adulterous wife, deprive an innocent husband of any interest he takes under a settlement, however much it may benefit the children of the marriage (*e*).

Orders respecting the custody of children.—In any suit or proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may (s. 35) from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and

(*u*) *Keats* v. *Keats*, 28 Law J., Prob. & Matr. 78.
(*x*) *Anichini* v. *Anichini*, 2 Curt. 210.
(*y*) *Gipps* v. *Gipps*, ante, p. 784.
(*z*) *Seller* v. *Seller*, 28 Law J., Prob. & Matr. 99.
(*a*) *Fisher* v. *Fisher*, 31 ib. 1. *Morris* v. *Morris*, ib. 33. *Robotham* v. *Robotham*, 27 ib. 61.
(*b*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6.
(*c*) *Johnson* v. *Johnson*, 31 Law J., Prob. & Matr. 29. *Pearce* v. *Pearce*, 30 ib. 182. *Horne* v. *Horne*, ib. 200.
(*d*) *Dempster* v. *Dempster*, 31 ib. 113. *Thomas* v. *Thomas*, 2 Sw. & Tr. 89.
(*e*) *Thompson* v. *Thompson*, 32 Law J., Prob. & Matr. 39.

proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery. The power of the court under this section of the statute of dealing with the custody of and access to children (*f*) exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or of dissolution of marriage. Where a petition for dissolution of marriage, therefore, is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage (*g*). The words, "just and proper," are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and of common law have been governed in questions respecting the custody of infants (*h*). Now, by 22 & 23 Vict. c. 61, s. 4, it is enacted, that after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may, upon application (by petition) for this purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery; as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone, or with one or more of the other judges of the court (*i*). In the interval between a decree nisi for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as to the custody of children, is an interim order under s. 35 (*k*).

The court under this statute has no greater power over infants than parents themselves have at common law. It cannot, therefore, interfere with the liberty of children where the parents themselves, if living together unsuspected, could not interfere with it. They may order maintenance for children up to the age of twenty-one, for that is conferring a benefit upon them, but they cannot control them in the free choice of a residence after the age of sixteen (*l*).

When a wife has been proved to have been guilty of adultery, the court will not give her access to, or the custody of, the children of the marriage (*m*).

Of the common-law right of fathers to the custody of their infant children.— Every father has a right by the common law to the exclusive custody of

(*f*) 31 Law J., Prob. & Matr. 213.
(*g*) *Seddon* v. *Seddon*, 31 ib. 101.
(*h*) *Marsh* v. *Marsh*, 28 ib. 16; 7 W. R. 129.
(*i*) *Webster* v. *Webster*, 31 Law J., Prob. & Matr. 184.
(*k*) *Cubley* v. *Cubley*, 31 ib. 161.
(*l*) *Ryder* v. *Ryder*, 31 ib. 44.
(*m*) *Bent* v. *Bent*, ib. 175. *Clout* v. *Clout*, ib. 176.

his legitimate infant children, although they be within the age of nurture (*n*); and if he has been deprived of this custody, it will be restored to him both by the courts of common law and the Court of Chancery (post, s. 2), so long as he has not by immorality and misconduct disqualified himself from being the legal guardian of his children, and forfeited his claim to the assistance of the court. A contract by the father for the abandonment of these rights, and for the maintenance and education of the child by a relation, or any other person, does not prevent him from claiming the custody of the child, and requiring the child to be delivered up to him (*o*). But when a parent has committed the care of an infant child to a relation who has brought it up, and had the guardianship and control of it for a lengthened period, the Court of Chancery will not interfere, and will not compel the restoration of the child to the parent, if the effect of the proceeding would be productive of serious injury to the position and prospects of the child (*p*).

Whenever an infant is in the custody of the mother, or of any third party, the courts of common law will compel her or the party having the child to deliver it into the custody of the father, unless it appear to the court that the child will be improperly restrained, or its morals contaminated, by being placed in the father's custody (*q*). The power of the father over the child seems to be subordinate, even in a court of common law, to the higher interests of the state; so that the court will not interfere in favour of a father who has been convicted of felony, and who is manifestly an improper person to have the guardianship of the infant (*r*). The courts of common law have authority to restore the father to his rights, but they have no power to compel him to perform his duty.

Although a father is entitled to have the custody of his children up to their attaining the age of twenty-one years, the courts of law will not interfere by *habeas corpus*, to withdraw a female child from the custody of persons with whom it may be, and hand it over to the custody of the father, if the child has attained the age of sixteen years. Up to that age, a female child is not entitled to withdraw herself from the father's protection, when there is nothing to show that he will not exercise proper parental care and protection over her; and persons who induce girls to leave their fathers before that age incur great danger of being convicted of abduction (*s*). Parental control, however, ceases at the age of sixteen,

(*n*) *Cartledge* v. *Cartledge*, 31 Law J., Prob. & Matr. 85.

(*o*) *Reg.* v. *Smith*, 22 Law J., Q. B. 116; 17 Jur. 24.

(*p*) *Lyons* v. *Blenkin*, Jac. 245. *Preston, in re*, 5 D. & L. 233; 17 Law J., Q. B. 221. *Fynth, in re*, 2 De Gex & Smale, 457; Anon. 2 Sim. N. S. 54.

(*q*) Cresswell, J., *Hakewill, in re*, 12 C. B. 232. *M'Clellan, ex parte*, 1 Dowl. P. C. 81; 13 C. B. 680.

(*r*) *Blisset's* case, Lofft. 748. *Rex* v. *Wilson*, 4 Ad. & E. 645, n. *Bailey, ex parte*, 6 Dowl. P. C. 311.

(*s*) *Reg.* v. *Howes*, 30 Law J., M. C. 47. *Reg.* v. *Timmins*, ib. 45.

so that a girl, after that age, has a right to say that she will not be controlled by either, or by both parents, as to where, or with whom, she will live (*t*).

Right of guardians for nurture to the custody of infant children.— Guardianship for nurture continues until the child has attained the age of fourteen years; and guardian for nurture may, by *habeas corpus*, get possession of the child during that period, unless it be shown that he is scandalously immoral, or wants the child for an improper purpose (*u*), for every guardian for nurture has by law a right to the custody of the child (*x*).

Inability of courts of common law to interfere with the right of the father to the custody of his children.— The courts of common law have professed themselves incompetent to control the right of the father to the custody of his infant children, and have decided that they have no power to interfere to take an infant child from the custody of its father, excepting for the purpose of removing improper and unjustifiable restraint of the person of the child, and protecting it from personal ill-usage and gross cruelty. Thus, where an Englishwoman married a Frenchman, and then separated herself from him on account, as she alleged, of ill-treatment, taking with her her infant at the breast, only eight months old, and the foreign husband came to her house, seized the child, carried it away with him half-naked in inclement weather, the Court of Queen's Bench held that it could not interfere for the purpose of taking the child from the father and restoring it to the mother, as the father had by the common law an undoubted right to the custody of his child (*y*). And the courts of common law have decided that they have no jurisdiction to interfere to take a child out of the custody of its father, although the father's cruelty to the mother has rendered it impossible for her to live with him, and he is himself confined in gaol, and cohabiting there with a profligate woman, who takes the child daily to the prison to see him (*z*).

Of the controlling power of the Court of Chancery over the father's right to the custody of his infant children.— The Court of Chancery, on the other hand, representing the sovereign as *parens patriæ*, exercises a general control over the maintenance and education of all the Queen's subjects within its jurisdiction, and will restrain the father from acquiring possession of the person of his infant children when he has deserted their mother, and has by immoral conduct proved himself to be unfit to have the guardianship of them, and the interference of the court is necessary

(*t*) *Ryder* v. *Ryder*, 30 Law J., Prob. & Matr. 44.

(*u*) *Race, in re*, 26 Law J., Q. B. 169.

(*x*) Com. Dig. Guardian (D).

(*y*) *Rex* v. *De Manneville*, 5 East, 221.

(*z*) *Skinner, ex parte*, 9 Moore, 278. *Rex* v. *Greenhill*, 6 N. & M. 255; 4 Ad. & E. 624.

to protect the child from temporal ruin or spiritual peril (*a*). When the conduct of the father has been such as to render it impossible that the wife can live with him, and the court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, it will adopt that custody which seems best for the interests of the children.

The grounds upon which the court has deprived a father, who has deserted, or driven away his wife, of the custody of his children, and placed them under the care of the mother, or a guardian appointed by the court, are, notorious impiety and irreligion, profligacy and adultery (*b*), teaching the children to swear, and introducing them to low company and immoral companions (*c*); the public avowal by the father of his being an atheist, and the publication by him of books deriding the truth of the Christian revelation and denying the existence of God (*d*). There are no bounds to the interference of the Court of Chancery with the rights of the father to the custody of his children, whenever his misconduct has brought about a separation between himself and the mother of those children, and his natural rights to the custody of them clash with their true interests; but it is a jurisdiction which the court is extremely reluctant to exercise (*e*), and will not be exercised upon the mere consideration of what may be manifestly for the benefit of the children.

Before the jurisdiction can be called into action, the court must be satisfied, not only that it has the means of acting safely and efficiently, but that the father has so conducted himself as to render it essential to the safety of the children, or to their welfare in some very serious respect, that his acknowledged rights should be superseded or interfered with (*f*). The mere fact of the father's having committed adultery, or of his keeping up an adulterous intercourse and being separated from his wife, has been held not to be sufficient of itself to warrant the interference of the court with his natural right to the custody of his children (*g*). But it is now competent to the Divorce Court, whenever a decree has been pronounced for a judicial separation by reason of the adultery of the husband, to order the infant children of the marriage to be placed under the custody of the mother.

When the court is compelled, in consequence of the profligacy or immorality of the father, to remove female children from the contamination of his example, it will not accompany that measure with the great

(*a*) *Thomas* v. *Roberts*, 3 De Gex & Smale, 781; 19 Law J., Ch. 506. *Creuze* v. *Hunter*, 2 Cox, 242.

(*b*) *Shelley* v. *Westbrooke*, 1 Jac. 264. *Warde* v. *Warde*, 2 Phill. 791.

(*c*) *Wellesley* v. *Wellesley*, 2 Bligh. N. S. 124.

(*d*) *Shelley* v. *Westbrooke*, Jac. 266.

(*e*) Ld. Cranworth, *Hope* v. *Hope*, 23 Law J., Ch. 689.

(*f*) *Curtis* v. *Curtis*, 34 Law T. R. 10.

(*g*) *Ball* v. *Ball*, 2 Sim. 35.

evil of separating one portion of the family from the other; "for if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court, as far as possible, to guard against (*h*).

Jurisdiction of the Court of Chancery over the custody of the children of British subjects born abroad.—According to the doctrine of our law, the sovereign, as *parens patriæ*, has an interest in the maintenance and education of all its subjects, whether they be resident within the realm or domiciled abroad. The child of a British father, born abroad, is a British subject, and is by statute, to all intents and purposes, to be deemed as if born in England; and the Court of Chancery, as representing the sovereign, will afford its aid, when requisite, in favour of the children of British subjects born abroad. Relief may be sought, and the jurisdiction of the court exercised, on behalf of an infant that is not, at the time the jurisdiction is asked for, within the control of the court. It may be that a child is out of the jurisdiction under such circumstances, that no jurisdiction can be exercised because no order can be enforced; and in such a case there is not a want of jurisdiction, but a want of power of enforcing jurisdiction. If parties abroad have property here, the court will proceed against that property to enforce obedience to its decrees (*i*).

Jurisdiction of the Court of Chancery over the children of foreigners in this country.—The Court of Chancery exercises the same jurisdiction over the custody of foreign children in this country that it does over native children; and the reason is, that foreign children, as well as foreign adults, owe allegiance to the crown, and are, to a certain extent, subjects of the crown, as long as they are in this country (*k*).

Right of access of mothers to their infant children and to the custody of children under seven years of age.—The statute 2 & 3 Vict. c. 54, s. 1, enables the Lord Chancellor and the Master of the Rolls, upon the petition of the mother of any infant in the sole custody or control of the father, or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant, at such times, and subject to such regulations, as he shall deem just. The Lord Chancellor and the Master of the Rolls are also empowered (ss. 3, 4), on the petition of the mother of any infant under the age of seven years, to order that such infant shall be delivered to, and remain in the custody of, the mother, until the infant attains that age; the order to be enforced, in case of disobedience, by process of contempt; but no order is to be made in favour of any mother against whom adultery shall be established. This statute does not destroy the right of the

(*h*) *Warde* v. *Warde*, 2 Phill. 791. (*i*) *Hope* v. *Hope*, 23 Law J., Ch. 686.
(*k*) Ib. 688; 2 Eq. R. 1047.

father to the sole custody of his infant child, but introduces new elements and considerations under which that right is to be exercised. "The act," observes Sir G. Turner, V. C., "proceeds upon three grounds. First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognising the paternal right. Thirdly, the act regards the interest of the child, for on no other grounds can I account for the distinction taken between the cases of children above and under seven years of age. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." Unless there has been a clear neglect by the father of his duty as a husband in some important particular affecting the interests of the child, the court will not deprive him of his right to the custody of it; nor will it interfere to give the wife access to the child if it be proved that she is an habitual drunkard, or that intercourse between the mother and child would be likely to be prejudicial to the interests of the child (*l*). Although the child is, at the time of the presentation of a petition by the mother, and continues to be, in the custody of the mother, the Court of Chancery has, within the equity of the act, jurisdiction to interfere (*m*).

Of the right of the mother to the custody of her children on the death or transportation of the father.—On the death of the father, the surviving mother has an absolute right to the custody of her infant children (*n*), and if the father is convicted of felony, and sentenced to be transported, the courts of common law will grant a *habeas corpus* to bring up the infants, that they may be delivered to the mother (*o*).

Of the obligation of parents to provide for their children.—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person" (*p*); but the stat. 43 Eliz. c. 2, s. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, according to an assessment to be made by justices of the peace at their general quarter sessions; and the stat. 4 & 5 Wm. 4, c. 76,

(*l*) *Halliday, in re*, 17 Jur. 56; V. C. T.

(*m*) *Tomlinson, in re*, 3 De Gex & Smale, 372.

(*n*) 2 & 3 Vict. c. 54, s. 1.

(*o*) *Bailey, ex parte*, 6 Dowl. P. C. 311.

(*p*) Ld. Abinger, *Mortimore* v. *Wright*, 6 M. & W. 487.

s. 56, provides, that all parish relief given to the wife or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (s. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (s. 59). A child left to starve, therefore, must apply to the parish, and the parish will compel payment of subsistence-money from the parent (*q*).

Proceedings before the Court for Divorce and Matrimonial Causes must be commenced by the filing of a petition in writing, setting forth the ground of complaint, accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition of which the petitioner has personal cognizance; and when the petitioner is seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the affidavit must state that no collusion or connivance exists between the petitioner and the other party to the alleged marriage. The petitioner must then issue and serve a citation upon the respondent, together with a copy of the petition, certified under the seal of the court, in accordance with the rules of practice and procedure of the court, and the respondent must file his answer, containing either a simple denial of the facts stated in the petition, or setting up special matters of defence verified by affidavit, and negativing collusion and connivance in certain specified cases (*r*).

Petitions for the restitution of conjugal rights must be made by writing, setting forth the marriage, the withdrawal of the party proceeded against from cohabitation, without just cause or lawful excuse, and must pray that the defendant, whether husband or wife, may be compelled to return to cohabitation. Every such petition must be accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition (*s*). The defendant in answer may plead Not guilty, or deny the marriage, or plead in bar the adultery or cruelty of the plaintiff. A suspension of the cohabitation must be clearly proved, in order to warrant the interference of the court (*t*).

Petitions for the dissolution of marriage on the ground of adultery must state, as distinctly as the nature of the case permits, the facts on which the claim to have the marriage dissolved is founded. If the petition is presented by the husband, he must make the alleged adulterer a co-respondent to the petition, unless he is excused from so doing on special grounds (*u*). If the petition is presented by a wife it is discretionary

(*q*) *Skelton* v. *Springett*, 11 C. B. 452.

(*r*) 20 & 21 Vict. c. 85, ss. 36–53, and the rules and orders for the regulation of Divorce and Matrimonial causes, 27 Law J., Court of Probate, &c., Rules, pp. 81–89. 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81.

(*s*) Rules and Orders for the Divorce Court, Brandt's Law of Divorce, 207–214.

(*t*) Shelford on Marriage and Divorce.

(*u*) *Hooke* v. *Hooke*, 27 Law J., Prob. & Matr. 61.

with the court to direct the person with whom the husband is alleged to have committed adultery to be made a respondent (*x*).

Where the petition in a suit for a dissolution of marriage by reason of adultery, set forth the celebration of the marriage, and the subsequent commission of divers specified acts of adultery, and the respondent in her answer put in several pleas or allegations of matters of defence, it was held that each plea must be taken by itself, and should *per se* be an answer to the matter to which it is pleaded; and if it contains only an answer to part of the charge, it should be pleaded to that part, as it is a very safe rule not to construe one plea by another (*y*).

Petitions to the Divorce Court respecting the custody of children.—As, in the ecclesiastical courts, acts of cruelty to children, committed in the presence of the mother, have, in some instances, been held cruelty to her, such acts may be alleged in a petition to the Divorce Court, praying for a judicial separation on the ground of cruelty, and also for an order respecting the custody of the children of the marriage; but at the hearing the court will confine the inquiry to the conduct of the husband and wife. In the majority of cases, enough will come out in the course of the inquiry to enable the court to give directions as to the custody of the children, and where this is not the case the court will require further evidence to be given before making any decree (*z*). The court will not deal with a petition for custody of children under the statute 22 & 23 Vict. c. 61, s. 4, until both parties are before it (*a*).

Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.—The Amendment of Evidence Act (14 & 15 Vict. c. 99), rendering parties to actions and suits competent and compellable to give evidence, does not apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83, s. 1), rendering the husbands and wives of the parties to any action or suit competent and compellable to give evidence, does not (s. 2) render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any proceeding instituted in consequence of adultery; but by 22 & 23 Vict. c. 61, s. 6, it is enacted, that on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be com-

(*x*) 20 & 21 Vict. c. 85, ss. 27, 28.
(*y*) *Tourle* v. *Tourle*, 27 Law J., Prob. & Matr. 52.
(*z*) *Suggate* v. *Suggate*, 28 ib. 46.
(*a*) *Stacey* v. *Stacey*, 29 ib. 63.

petent and compellable to give evidence of or relating to such cruelty or desertion.

Evidence of co-respondents.—The co-respondent in a suit for dissolution of marriage is not a competent witness so long as he remains a party to the record (*b*); but after the close of the evidence on the part of the petitioner the court may direct the co-respondent to be dismissed from the suit, if it thinks there is not sufficient evidence against him (*c*), and he may then be examined as a witness in the cause.

Mode of taking evidence.—Witnesses in proceedings before the court, where their attendance can be had, are to be sworn and examined orally in open court; but parties, except where otherwise provided by the statute, are at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the court, be subject to be cross-examined by, or on behalf of, the opposite party, orally in open court, and after such cross-examination re-examined by or on behalf of the party by whom the affidavit was filed. The court may, if it thinks fit, order the attendance of the petitioner, and examine him, or permit him to be examined, or cross-examined, on oath, on the hearing of any petition; but no petitioner is bound to answer any question tending to show that he has been guilty of adultery.

In all suits and proceedings other than proceedings to dissolve any marriage, the court is to proceed and give relief (s. 22), on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted and given relief. It is the duty of the court, upon the hearing of any petition for the dissolution of marriage, to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at, the adultery, or has condoned the same. It is its duty also to inquire into any counter-charge which may be made against the petitioner, and (s. 30) if not satisfied, to dismiss the petition. In a suit for a dissolution of marriage, where the co-respondent has appeared but has put in no answer, he will not at the hearing of the petition be allowed to take any part in the proceedings. The main object of the Divorce Act in requiring the adulterer to be joined as a co-respondent being to give him an opportunity to vindicate his character, the correct practice appears to be that the case of the wife, which is the principal one, should be gone into before that of the co-respondent, which is merely accessory to it (*d*).

Appeal to the full court and the House of Lords.—Either party dis-

(*b*) *Robinson* v. *Robinson*, 27 Law J., Prob. & Matr. 91.

(*c*) 21 & 22 Vict. c. 108, s. 11.

(*d*) Cockburn, C. J., *Robinson* v. *Robinson*, 27 Law J., Prob. & Matr. 92.

satisfied with the decision of the Judge Ordinary may, within three months, appeal therefrom to the full court, whose decision is (s. 55) final. An appeal is also given (s. 56) to the House of Lords from the decision of the full court, on any petition for the dissolution of marriage.

Trial of questions of fact before a jury.—By 20 & 21 Vict. c. 85, s. 28, it is enacted, that either of the parties to a petition praying for the dissolution of marriage on the ground of adultery, may insist on having the contested matters of fact tried by a jury; and by s. 36 it is further enacted, that in all questions of fact arising in proceedings under the act it shall be lawful for, but, except as thereinbefore provided, not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the court, by the verdict of a special or common jury.

When the proceedings have raised the questions of fact necessary to be determined either party may, within fifteen days from the filing of the last proceeding, apply to the Judge Ordinary to direct the truth of any question of fact arising in the proceedings to be tried by a jury. If neither party claim that the cause shall be heard before a jury, the Judge Ordinary must determine whether the same shall be tried by a jury or before the court itself, and whether by oral evidence or upon affidavit. And whenever a cause is to be tried before a jury, the Judge Ordinary is to direct the questions at issue to be stated in the form of a record, to be settled by one of the registrars (*e*). In a suit for a judicial separation the parties cannot, as in a suit for dissolution of marriage, demand, as a matter of right, that the issues of fact be tried by a jury; but the court has a discretionary power, under s. 36 of the Divorce Act, to grant or refuse the application for a jury. It will generally, however, on the application of either party, direct questions of fact to be tried by a jury (*f*). And in cases which have to be tried before the full court, in which there is likely to be any considerable controversy as to the facts, trial by jury will generally be directed (*g*).

Upon the trial of any question of fact before a jury, the court or judge has (s. 38) the same power, jurisdiction, and authority as any judge of any of the superior courts sitting at *nisi prius*. A bill of exceptions may (s. 39) be tendered, and a general or special verdict, subject to a special case, may be returned as in causes tried in the superior courts, and the matter of law heard and determined by the full courts, subject to such right of appeal as is given by the statute.

Proceedings at the trial.—The evidence at the trial of questions of fact before a jury in divorce and matrimonial causes, must be confined to the

(*e*) 20 & 21 Vict. c. 85, s. 38, and the Matrimonal causes, rules, and orders, 27 Law J., p. 82; R. 20–23.

(*f*) *Marchmont* v. *Marchmont*, 27 Law J., Prob. & Matr. 59.

(*g*) *Ratcliffe* v. *Ratcliffe*, ib. 60.

issues raised on the record as settled by the registrar. A respondent, therefore, cannot prove anything which he has not pleaded; but he will generally have an opportunity of pleading material facts afforded to him at any stage of the proceedings, on such terms as seem equitable to the court (*h*). When by the record the marriage is not denied, and the respondent admits the withdrawal from cohabitation, but denies that it was without lawful cause, and goes on to specify the lawful cause, the respondent is entitled to begin (*i*).

Evidence of condonation.—When the issues are to be tried by a jury, the question whether or not there has been condonation is a question of fact to be decided by the jury, and not a question of law. It is for the court to direct the jury what will constitute a condonation, and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation (*k*).

Petition for damages from adulterers.—By the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished, but by s. 33 of the same statute it is enacted, that any husband may either in a petition for dissolution of marriage, or for judicial separation, or by petition only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation were formerly tried and decided in courts of common law, and the damages to be recovered are in all cases to be ascertained by the verdict of a jury, although the respondents or either of them may not appear (*l*). The petition must be addressed to the Court for Divorce and Matrimonial Causes, and must be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted.

Of the pleadings in claims for damages resulting from adultery.—The pleadings in claims for damages from any person on the ground of his having committed adultery with the wife of the claimant, resemble the pleadings formerly used in actions for criminal conversation. The statement of the cause of action simply is, "that the defendant debauched and carnally knew the plaintiff's wife," and the defendant either pleads "not guilty," or alleges that he did what was complained of by the plaintiff's leave, and the plaintiff replies, taking issue upon the defendant's plea. The plea of Not guilty puts in issue only the fact of the commission of the wrongful act, so that the plaintiff under this plea cannot be put to the

(*h*) *Plumer* v. *Plumer*, 29 Law J., Prob. & Matr. 63.
(*i*) *Cherry* v. *Cherry*, 28 ib. 36. *Bacon* v. *Bacon*, 29 ib. 61.
(*k*) *Peacock* v. *Peacock*, 27 ib. 71.
(*l*) 20 & 21 Vict. c. 85, s. 32.

proof of the marriage (*m*). If, therefore, the defendant wishes to show that no valid marriage was ever celebrated between the claimant and the person alleged to be his wife, he must traverse the allegation in the statement of the cause of action, that the woman alleged to have been debauched by the defendant was the wife of the plaintiff.

Evidence at the trial of a claim for damages for adultery — Proof of the marriage. — In order to establish a *primâ facie* case for damages from a defendant who is charged with having committed adultery with the claimant's wife, it is necessary to prove a legal marriage between the claimant and the woman alleged to be his wife. It is not enough to show that he and his alleged wife intended to celebrate, and did in their belief celebrate, a lawful and formal marriage, and did afterwards cohabit as man and wife upon the faith of this *bonâ-fide* belief, for the burthen is on him to prove a clear legal marriage, whereby the relation of husband and wife is really created; and a mere proof of the ceremony which the parties suppose to be sufficient to constitute that relation is not enough. It must be shown to be sufficient according to law for that purpose (*n*).

Proof of marriage by certified extracts from parochial registers of marriages.—The statute 52 Geo. 2, c. 146, formerly provided (ss. 1–5) for the making and keeping by the rector, vicar, curate, or officiating minister of every parish or chapelry where marriages, &c., have been celebrated according to the rites of the Established Church, of a public register of such marriages, and for the transmission (ss. 6, 7) of annual copies of such registers to the registrar of the diocese, and for the making and preserving (s. 12) of alphabetical lists and indexes, to be open to public search at all reasonable times, on payment of the usual fees. But this statute, so far as it relates to the registration of marriages, has been repealed by 6 & 7 Wm. 4, c. 86, which provides (s. 2) a general register office in London for keeping a register of marriages, &c., and provincial registers (s. 9) in every union. Marriage-register books are to be furnished to the rector, vicar, or curate of every church or chapel, and to the registering officers of the various bodies of Dissenters, in whose chapels marriages are celebrated (s. 30), who are required (s. 31) to register therein all marriages, and forward (s. 33) certified copies thereof to the superintendent registrars, who are to send them (s. 34) to the Registrar-General, to be arranged for public inspection. By s. 35 it is enacted, that every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of marriages, &c., shall at all reasonable times allow searches to be made of any register-book in his keeping, and shall give a certified copy, under his

(*m*) *Kenrick* v. *Horder*, 7 Ell. & Bl. 632.

(*n*) *Catherwood* v. *Caslon*, 13 M. & W. 265; 13 Law J., Exch. 334. *Morris* v. *Miller*, 1 W. Bl. 632; 4 Burr. 2057.

hand, of any entry or entries in the same, on payment of certain specified fees. Provision is also made for searches at the superintendent registrar's office (s. 36), and the General Register Office (s. 39), and for the issue of certified copies under the hand of the superintendent registrar (s. 36), and under the seal of the Registrar-General. And all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, are to be received as evidence without any further or other proof of such entry; and no certified copy purporting to be given in the said office, which is not sealed or stamped as aforesaid, is to be of any force or effect.

Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.—The Marriage Act, 6 & 7 Wm. 4, c. 85, also provides (s. 4) for notices of intended marriages to be given to the Superintendent Registrar of Marriages, who is (s. 5) to file such notices, and to furnish therefrom to the Registrar-General a book, to be called "the Marriage-Notice Book," which is to be open at all reasonable times to persons desirous of inspecting it. Provision is made for the appointment of registrars of marriages, for registering (s. 18) places of worship for the solemnisation of marriages in the presence (s. 20) of the registrar; for the registration (s. 23) of such marriages; for the making and delivering (s. 24) of certified copies of the entries of marriage in the register to the superintendent registrar, to be kept by him with the records of his office. And by the statute 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, ss. 1 and 2, provision is made for the verification and deposit in the custody of the Registrar-General of various non-parochial registers of marriages, &c., for the framing of lists of all such records and registers; for the making of searches, and the grant (3 & 4 Vict. c. 92, s. 5) of certified extracts: also (s. 6) for the production in courts of justice of such original registers and records; for the issue (s. 9) of certified extracts therefrom, sealed with the seal of the General Register Office; for the admission of such certified extracts on the trial of causes, but not on criminal trials (s. 11), after notice given to the opposite party, in sufficient time before the trial to enable him to inspect the original register or record; also (s. 12) for the use of the original register or record in evidence after notice. In criminal cases, the original register or record is required (s. 18) to be produced, and notice given of the intention to use it.

Marriages of British subjects solemnised abroad, may be proved through the medium of certified copies of the consular registers, which are transmitted annually to the Registrar-General (*o*). A marriage in India may be established by an authenticated copy of the register of

(*o*) 12 & 13 Vict. c. 68, ss. 11, 12, 18. As to the admissibility of a certificate of a foreign marriage, *Abbott* v. *Godoy*, 20 Law J., Prob. & Matr. 57.

marriages kept in India by public authority and transmitted to this country (*p*).

Proof of the marriage having been celebrated in a registered place of worship.—By 19 & 20 Vict. c. 119, s. 24, the Registrar-General is required to give to any one demanding the same a certified copy of the returns made to him, or an extract therefrom, with respect to any place of meeting for religious worship contained therein.

Incompetency of the husband and wife to prove the marriage.—The statutes enabling husbands and wives to give evidence against each other in certain cases do not render them competent witnesses to prove the marriage in claims for damages from adulterers (*q*).

Marriages, therefore, may be proved by a copy or extract from the register, purporting to be signed and certified as a true copy or extract by the parish-officer, whether incumbent, rector, vicar, or curate, who has the custody of such register (*r*). And the identity of the claimant and his wife with the parties named in the register, as having been married at the time and place therein mentioned, may be proved by any person who was present at the ceremony, or by any evidence sufficient to satisfy a jury of their identity (*s*).

The fact of the marriage may also be proved by the testimony of an eye-witness of the ceremony, without the production of any examined or certified extract from the register. Where a witness deposed that he was present in a Wesleyan chapel, and that a form of marriage was there celebrated between A and B, in the presence of the registrar of marriages, and spoke to all the circumstances attending the ceremony, the entry in the registrar's book, a copy of which was produced at the trial, it was held that this was *primâ facie* evidence of the due solemnisation of a marriage between the parties in a duly registered chapel, in which marriages might be legally solemnised (*t*).

Evidence on the part of the defendant.—It is no answer to a claim by a husband for damages from a person who is alleged to have committed adultery with his wife, to show that he has made a similar claim against another man, and recovered damages from him (*u*); but the fact may be given in evidence in reduction of damages: for where the plaintiff's wife had not been criminally connected with the defendant alone, Lord Ellenborough directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, &c., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the

(*p*) *Ratcliffe* v. *Ratcliffe*, 29 Law J., Prob. & Matr. 202.

(*q*) Ante, pp. 793, 794. Taylor on Evidence, pp. 1091–1095.

(*r*) *Re Hall's estate*, 22 Law J., Ch. 177; 14 & 15 Vict. c. 99, s. 14.

(*s*) *Birt* v. *Barlow*, 1 Doug. 174.

(*t*) *Reg.* v. *Mainwaring*, 26 Law J., M. C. 11.

(*u*) *Gregson* v. *M'Taggart*, 1 Campb. 415.

whole of the injury that the plaintiff had sustained (*x*). If the claimant has connived at the adulterous intercourse (*y*), or if he has suffered or encouraged his wife to live in a state of prostitution, he cannot come into a court of justice to ask for damages. "His having suffered such connexion with other men, is equally a bar to the action as if he had permitted the defendant to be connected with her" (*z*).

The infidelity of the husband himself constitutes no bar to the claim for damages from the adulterer, but it may be given in evidence in mitigation of damages (*a*).

Of the damages recoverable in cases of adultery.—The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together, and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury, and the court will not interfere with their estimate of damnges unless it is manifestly and palpably outrageous (*b*). It was formerly considered that a husband who had voluntarily relinquished the society of his wife, and separated himself from her, had no claim for damages against a person who had subsequently seduced her, the loss of the comfort and society of the wife being considered to be the gist of the action (*c*); but it is now held that the separation is no bar to the husband's claim for damages (*d*); it is a fact, however, to be taken into consideration by a jury in estimating the amount of them.

It may be shown, in reduction of damages, that the husband deserted or neglected his wife, or threw her in the way of temptation, or treated her with coldness, and as a person whom he did not esteem or regard; also that the marriage was kept secret, and that the wife was allowed to live with her mother, and pass as a single woman, and that she was not known by the defendant to be married at the time of the commission of the adultery (*e*). Proof of adulterous intercourse between the wife and other men prior to the commission of the adultery with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing (*f*). Letters also written by the claimant's wife before the commission of the adultery, soliciting the defendant's addresses, and enticing him into the

(*x*) *Gregson* v. *Thatcher*, 1 Campb. 415, n.
(*y*) *Cibber* v. *Sloper*, cited 4 T. R. 655.
(*z*) Per Lord Kenyon, *Hodges* v. *Windham*, Peake, 54.
(*a*) *Bromley* v. *Wallace*, 4 Esp. 237.
(*b*) *Wilford* v. *Berkeley*, 1 Burr. 609. *Duberley* v. *Gunning*, 4 T. R. 657.
(*c*) *Weedon* v. *Timbrell*, 5 T. R. 357.
(*d*) *Chambers* v. *Caulfield*, 6 East, 256.
(*e*) *Calcraft* v. *Earl Harborough*, 4 C. & P. 501.
(*f*) Alderson, J., *Winter* v. *Henn*, 4 C. & P. 498.

adulterous connexion, are admissible in evidence in mitigation of damages, but not proofs of misconduct subsequent to the commission of the adultery (*g*).

When the husband and wife are separated from each other the wife's letters to her husband are admissible in evidence for the purpose of showing the state of her affections at the time of the writing of the letters; but to remove all grounds for any suspicion of collusion between the husband and wife, it should be proved that the letters were written at the time they bear date, and before there was any knowledge or suspicion of the adulterous intercourse (*h*). Such letters are not to be rejected merely because they contain statements of specific facts calculated to influence the minds of the jury, and which are not strictly evidence. But the jury must be cautioned not to allow themselves to be influenced by the particular facts alluded to (*i*).

Evidence of the defendant's circumstances or property has been held to be inadmissible for the purpose of enhancing the damages, it being considered that the jury ought to give compensation for the injury sustained without reference to the wealth of the defendant (*k*). But evidence of the humble condition in life, and of the poverty of the defendant, has been received in mitigation of damages, and for the purpose of showing that the allurements and temptations to the commission of the adultery did not emanate from the defendant.

Effect of the death of the wife pending the proceedings for damages.—If it appears that the wife has died during the pendency of the proceedings, the jury should give damages for the shock which has been given to the feelings of the husband, and for the loss of the society of the wife down to the time of her death, though it appear that the husband was wholly unaware of his own dishonour until the disclosure was made to him by his wife on her death-bed (*l*).

Application of the damages recovered—Payment of costs.—After verdict, the Court for Divorce and Matrimonial Causes is to direct in what manner the damages are to be applied, and is empowered to settle the whole, or any part thereof, for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife (*m*). And whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, the court may order the adulterer to pay the whole or any part of the costs of the proceeding (*n*).

(*g*) *Elsam* v. *Faucett*, 2 Esp. 562.
(*h*) *Trelawney* v. *Coleman*, 1 B. & Ald. 90; 2 Stark. 191. *Edwards* v. *Crock*, 4 Esp. 38.
(*i*) *Willis* v. *Bernard*, 1 M. & Sc. 584; 8 Bing. 376.
(*k*) Alderson, B., *James* v. *Biddington*, 6 C. & P. 590.
(*l*) *Wilton* v. *Webster*, 7 C. & P. 198.
(*m*) *Bent* v. *Bent*, 30 Law J., Prob. & Matr. 175.
(*n*) 20 & 21 Vict. c. 85, ss. 33, 34.

SECTION II.

OF SEDUCTION.

Of the harbouring of married women and inducing them to live apart from their husbands.—Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him. Where a married woman came to the defendant's house and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors, and upon this representation the defendant received her into his house, and suffered her to continue there after he had received notice from the husband not to harbour her, Lord Kenyon held that an action could not be maintained against him, as he appeared to have acted solely from principles of humanity (*o*), and that, if a husband ill-treats his wife, so that she is forced to leave his house through fear of bodily injury, any person may safely, nay honourably, receive her and protect her (*p*). Where the defendant persuaded and procured a wife to separate from her husband and live apart from him, it was held that he was responsible in damages to the latter, and that every moment a wife continues absent from her husband without his consent it is a new tort, and every one who persuades her to do so does a new injury (*q*).

Of the seduction and loss of service of servants.—Every person who knowingly and designedly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring him and keeping him as servant, after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages (*r*). And if a servant or apprentice quits his master or employer without just cause, before his term of service expires, and another retains and employs him against the will of the master, and with notice of his having deserted the service of the latter, an action for damages is maintainable against him, as the very act of giving the servant employment is affording him the means of keeping out of his former service (*s*).

(*o*) *Philp* v. *Squire*, Peake, 115.
(*p*) *Berthon* v. *Cartwright*, 2 Esp. 480.
(*q*) *Winsmore* v. *Greenbank*, ante, p. 8.
(*r*) *Lumley* v. *Gye*, 2 Ell. & Bl. 224.
(*s*) *Blake* v. *Layton*, 6 T. R. 221. *Fawcet* v. *Beavres*, 2 Lev. 63; Leon. 249. *Hamilton* v. *Vere*, 1 Lev. 209; 2 Saund. 169.

A taskworkman, who contracts with another by the job or piece, is the servant of that other until the work is finished, and no other person can, whilst such work is going on and is unfinished, lawfully employ the servant, if, by so doing, he causes him to leave his work unfinished, and has knowledge of the fact. Thus, where a journeyman shoemaker, living and working in his house, was employed by a shoe-manufacturer to make a certain number of shoes at so much per pair, to be completed by a given time, and the defendant took the man into his service, and thereby caused him to leave a number of shoes unfinished, and neglected to discharge him after having received notice from the plaintiff of the subsisting engagement between such workman and himself, he was held responsible in damages to the plaintiff for the injury (*t*). If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it (*u*).

The master may maintain an action for compensation for the loss of the services of his servant through the tortious act of another, whether the servant be a child or not, provided it appear that the child was capable of rendering, and did render, some service, however trifling; but if no service was, or could be, performed by the child, an action is not maintainable.

Of injuries to parents in being deprived of the services of their children through the tortious act of another.— A parent has no remedy for an injury done to his child by the wrongful act of another, unless the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant. Thus, where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, whereby the plaintiff was deprived of the service of the child, and was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the action was not maintainable (*x*). If the father of a child incurs necessary expense in curing his child from an injury wrongfully inflicted by the defendant, he cannot recover those expenses upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

Of injuries to parents from the seduction of their daughters.— The law gives no remedy to the parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity (*y*); but

(*t*) *Hart* v. *Aldridge*, Cowp. 54. Bac. Abr. MASTER AND SERVANT (O).
(*u*) *Foster* v. *Stewart*, 3 M. & S. 201.
(*x*) *Grinnell* v. *Wells*, 7 M. & Gr. 1041; 8 Sc. N. R. 741.
(*y*) *Saterthwaite* v. *Duerst*, 4 Doug. 315; 5 East, 47, n.

if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

Of loss of service from the seduction of daughters and servants.— The foundation, therefore, of the action by a father to recover damages against a wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service he is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be alleged in the declaration of the cause of action, and be proved at the trial, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by her labour, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, &c. (*z*) ; or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered her unable to learn the trade (*a*). However slight the act of service may be, it must be a real genuine service, such as the parent may command. The making tea, or doing any household work at the command of the parent, is, however, quite sufficient to constitute the relationship of master and servant when the girl is residing with her father and mother (*b*).

Effect of the absence of the daughter from the parent's roof at the time of the seduction.— As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction, for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as being in the subordinate position of a servant, and the father cannot maintain an action for loss of service (*c*). If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person, the father has no ground of action for the seduction (*d*), unless the person with whom she is living inveigled her away from home into a pretended service, for the

(*z*) *Grinnell* v. *Wells*, 14 Law J., C. P. 19.

(*a*) *Harris* v. *Butler*, 2 M. & W. 539.

(*b*) *Thompson* v. *Ross*, 5 H. & N. 16; 29 Law J., Exch. 1.

(*c*) *Manley* v. *Field*, 7 C. B., N. S. 96; 29 Law J., C. P. 79.

(*d*) *Dean* v. *Peel*, 5 East, 47. *Grinnel* v. *Wells*, 7 M. & Gr. 1042; 8 Sc. N. R. 741.

very purpose of seducing her (post, p. 805), although it be alleged in the declaration, and proved at the trial, that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired (*e*). But if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages (*f*). Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home and assist her widowed mother in needlework, has been held to be insufficient to enable the mother to maintain an action for damages (*g*). If the relation of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action. The state of the case then is, that the master has taken into his service a servant whose services are less valuable to him by reason of antecedent occurrences, and there is no consequential injury of which he has any right to complain as against the seducer (*h*).

Pretended hiring of girls for purposes of seduction.—If a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently-concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, and does not throw any impediment in the way of an action by the latter for the seduction. Thus, where the plaintiff's daughter, who was residing with the plaintiff, and rendering him service in domestic matters, advertised for a situation as lady's maid, and the defendant, seeing the advertisement, proposed to engage her in that capacity for his sister, but afterwards hired her at weekly wages to take care of an empty house, where he seduced her and got her with child, it was held by Abbott, C. J., to be a question for the jury whether the daughter was withdrawn from her father's house by the defendant under a *bonâ-fide* contract for her services, or the whole matter was a mere pretence and contrivance on the part of the defendant to get possession of her person. "If she was the servant of the defendant," observes his lordship, "the action certainly cannot be maintained; but had she ceased to be the servant of her father, the plaintiff? If the jury be of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house, without any real intention to hire her as a servant, I am of opinion that the action is maintainable." And afterwards, in summing up to the jury, his lordship said, "During the time that she was in her father's house she was

(*e*) *Blaymire* v. *Haley*, 6 M. & W. 55. *Harris* v. *Butler*, 2 ib. 539.
(*f*) *Griffiths* v. *Teetgen*, 15 C. B. 344.
(*g*) *Thompson* v. *Ross*, 29 Law J., Exch. 1; 8 W. R. Ex. 44; 35 Law T. R., Ex. 43.
(*h*) *Davies* v. *Williams*, 10 Q. B. 728 16 Law J., Q. B. 369.

his servant; was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house at the rate of 7*s.* per week: but if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them" (*i*).

Seduction of married daughters and servants.—Where a married woman separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was contended that a married woman was not capable of making any contract of service; but the court held that, as against a wrong-doer, it was sufficient to prove that the relationship of master and servant *de facto* existed at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent to the defendant to set up his right to the services of his wife as an answer to the action (*k*).

Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered.—If the defendant, though he seduced the girl, was not the father of the child of which she was subsequently delivered, and did not consequently cause the pregnancy and illness, and the consequent loss of service, there is no cause of action against him (*l*).

Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.—It is expected of every parent that he should be jealous of, and watchful over, the honour of his daughter, and protect her, as far as possible, from the advances and solicitations of notorious libertines. If, therefore, he introduces her to profligate acquaintances, encourages improper intimacies, and invites the injury of which he complains, he has no ground of action for damages. Where the defendant proposed to marry the daughter of the plaintiff, and was received and entertained as her suitor at the plaintiff's house, and the plaintiff then ascertained that the defendant was a married man and a great libertine, notwithstanding which he allowed him to continue his addresses to the daughter, on the strength of certain assurances which he gave to the effect that his wife was afflicted with a mortal disease, and could not live long, and then he would marry the daughter, and the defendant ultimately seduced her, it was held, that as the plaintiff had by his own misconduct contributed to the injury of which he complained, he had no ground of action for redress (*m*).

Of the parties entitled to maintain an action for seduction.—To entitle a party to maintain an action for the seduction of a girl, it must be proved,

(*i*) *Speight* v. *Oliviera*, 2 Stark. 495.
(*k*) *Harper* v. *Luffkin*, 7 B. & C. 387.
(*l*) *Eager* v. *Grimwood*, 1 Exch. 61; 16 Law J., Exch. 236.
(*m*) *Reddie* v. *Scoolt*, Peake, 316.

as we have seen, that the relationship of master and servant existed between the plaintiff and the party seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant only. Thus, in the case of an orphan living with a relation, or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relation or benefactor is the proper party to sue for the wrong done (*n*). Standing *loco parentis*, he is permitted to recover damages ultra the mere loss of service, as when the action is brought by the actual parent (*o*).

Of the pleadings in actions for seduction.—If a declaration by a parent for the seduction of his daughter contains no allegation of the loss of the service of the daughter, it is bad in arrest of judgment. "The loss of service must be alleged in the declaration, and must be proved at the trial, or the plaintiff must fail" (*p*). The defendant either pleads "Not guilty," or that he did what is complained of by the plaintiff's leave, and the plaintiff replies, taking issue upon the plea (*q*). The plea of Not guilty puts in issue both the fact of the seduction and the fact that the person seduced was the servant of the plaintiff (*r*). Under this plea the defendant may show that the seduced girl was in the service of a third person, and was not at the time of the seduction residing with the plaintiff; also that the defendant, though he had carnal knowledge of the seduced woman, was not the father of the child of which she was delivered, and, consequently, that the confinement and illness, and loss of service and expense, were not occasioned by the act of the defendant (*s*); also that the illness and consequent loss of service were not occasioned by the act of seduction, but by the defendant's leaving and abandoning the girl after he had seduced her (*t*); also that the seduced woman entered the service of her master in a state of pregnancy (*u*), or that the plaintiff was a party to his own dishonour, and by his own imprudence and misconduct has contributed to the injury of which he complains (*x*).

Evidence at the trial in actions for seduction—Proof of the relationship of master and servant.—As the loss of service is the foundation of the action for seduction, it is necessary to establish the relationship of master and servant between the plaintiff and the seduced girl, as well as to prove the fact of the seduction itself, in order to make out a case for damages. The

(*n*) Holl's Rep. 453, note.
(*o*) *Irwin* v. *Dearman*, 11 East, 24. *Edmonson* v. *Machell*, 2 T. R. 4.
(*p*) Tindal, C. J., *Grinnell* v. *Wells*, 7 M. & Gr. 1040.
(*q*) 15 & 16 Vict. c. 76, Sched. B, 38, 39.
(*r*) *Holloway* v. *Abel*, 7 C. & P. 528. *Torrence* v. *Gibbins*, 5 Q. B. 297.
(*s*) *Eager* v. *Grimwood*, 1 Exch. 61; 16 Law J., Exch. 230.
(*t*) *Boyle* v. *Brandon*, 13 M. & W. 738; 14 Law J., Exch. 344.
(*u*) *Davies* v. *Williams*, 10 Q. B. 728.
(*x*) *Reddie* v. *Scoolt*, Peake, 316.

relationship of master and servant must be shown to have subsisted at the time of the seduction, for, if it appears that the relationship was contracted afterwards, there is no consequential injury, and no ground of action (*y*). Very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service (*z*). And where a daughter is shown to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and command, service will be presumed, and proof of acts of actual service will be unnecessary (*a*). It is not necessary to produce the seduced daughter as a witness at the trial, if the seduction can be proved aliunde, though the withholding of her testimony may afford a strong topic of observation to the jury (*b*).

Of the damages recoverable in actions for seduction.— In estimating the damages to be given to a father who sues for compensation for the loss of service of his daughter from seduction, the jury are not confined to the consideration of the mere loss of service, but may give damages for the distress and anxiety of mind which the parent has sustained in being deprived of the society and comfort of his child, and by the dishonour which he receives; "although it is difficult," observes Lord Ellenborough, "to conceive upon what legal principles the damages can be extended ultra the injury arising from the loss of service" (*c*). The jury also must take into consideration the situation in life and circumstances of the parties, and say what they think, under all the circumstances of the case, is a reasonable compensation to be given to the injured parent (*d*). "In point of form," observes Lord Eldon, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (*e*).

Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.— Evidence is inadmissible to show that the defendant accomplished the seduction through the medium of a promise of marriage, for the purpose of enhancing the damages, as the breach of promise constitutes a distinct cause of action, in respect of which damages are recoverable by the daughter. "But you

(*y*) *Davies* v. *Williams*, 10 Q. B. 729.
(*z*) Buller, J., *Bennett* v. *Allcott*, 2 T. R. 168; ante, p. 804.
(*a*) *Maunder* v. *Venn*, M. & M. 323. *Jones* v. *Brown*, 1 Esp. 217. *Fores* v. *Wilson*, Peake, 77. Coleridge, J., *Torrence* v. *Gibbins*, 5 Q. B. 300.
(*b*) *Farmer* v. *Joseph*, Holt, 452.
(*c*) *Irwin* v. *Dearman*, 11 East, 23.
(*d*) *Andrews* v. *Askey*, 8 C. & P. 9. *Southernwood* v. *Ramsden*, cited ib. 9.
(*e*) *Bedford* v. *M'Kowl*, 3 Esp. 120.

may ask, observes Lord Ellenborough, "whether the defendant paid his addresses to her in an honourable way" (*f*). "The jury do right," observes Wilmot, C. J., "in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings another action against the defendant for the breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to pay his addresses to his daughter" (*g*).

If, in the course of the trial, a promise of marriage is inadvertently proved, the jury must be told to exclude the injury resulting to the seduced girl from the breach of promise of marriage from their consideration, and leave it quite out of the question in determining the amount of the damages to be recovered by the father and master for the loss of service (*h*).

Evidence in mitigation of damages.— The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Primâ facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents, but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages; and if evidence is given to impeach the character of the girl, it may be met and rebutted by evidence on the part of the plaintiff of her previous good character. The defendant may call witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses prior to the period of the seduction, either for the purpose of reducing the damages (*i*), or for the purpose of showing that the defendant is not the father of the child, and, therefore, that his sexual intercourse with the daughter did not occasion the loss of service of which the plaintiff complains (*k*). It may be shown that the seduced girl, prior to the seduction, was in the habit of keeping loose company or of giving utterance to loose language and immodest remarks; but before witnesses can be called to prove the nature of the language or of the remarks, she must be pointedly and expressly asked in her cross-examination, whether she ever used the particular language or the precise remarks intended to be given in evidence against her (*l*).

Where the whole of the cross-examination in an action for seduction went to show that the party seduced had conducted herself immodestly

(*f*) *Dodd* v. *Norris*, 3 Campb. 520. *Elliott* v. *Nicklin*, 5 Pr. 641.
(*g*) *Tullidge* v. *Wade*, 3 Wils. 18.
(*h*) Ibid.
(*i*) *Verry* v. *Watkins*, 7 C. & P. 308.
(*k*) *Eager* v. *Grimwood*, 1 Exch. 61; 16 Law J., Exch. 236.
(*l*) *Carpenter* v. *Wall*, 11 Ad. & E. 803.

and kept improper company, witnesses were allowed to be called to prove her general good character and modest deportment, and the general respectability of the family (*m*). But where the daughter was cross-examined to show that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct, Lord Ellenborough refused to allow witnesses to be called to the general character of the daughter, saying she had had ample opportunity of setting her conduct right in the course of her re-examination (*n*). And where evidence was given on the part of the defendant to prove that the girl, previous to her acquaintance with him, had had a child by another man, Lord Ellenborough restricted the evidence tendered by the plaintiff in reply thereto to disproving the specific breach of chastity alleged by the defendant, and would not allow him to give general evidence of his daughter's good character for chastity and respectability (*o*).

Damages recoverable in actions for inducing or persuading wives, servants, or workmen, to abandon their duties or neglect the fulfilment of a contract.— If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuasion of the defendant, damages far beyond the value of the subject-matter of the contract may be recoverable from the wrong-doer (*p*). The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away, but the jury are justified in giving ample compensation for all the damage resulting from the wrongful act (*q*). Where the plaintiff alleged that his wife, having left him and lived apart from him, during which time a considerable fortune was left to her separate use, and she, being willing to return to the plaintiff, the defendant unlawfully persuaded her to continue to live away from the plaintiff, whereby he lost the assistance of his wife in his domestic affairs and the advantage of her fortune, 3000*l.* damages were recovered for the wrong done (*r*).

Indictment for the abduction of married girls under the ages of sixteen and twenty-one.—Whoever unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will, of her father or mother, or of any other person having the lawful care or charge of her, may be indicted and convicted of a misdemeanour (*s*). And whoever fraudulently allures, takes away, or detains any woman under the age of twenty-one years, who has any interest in any real or personal estate, or is presumptive heiress, or coheiress, or next

(*m*) *Bate* v. *Hill*, 1 C. & P. 100.
(*n*) *Dodd* v. *Norris*, 3 Campb. 518.
(*o*) *Bamfield* v. *Massey*, 1 Campb. 460.
(*p*) Crompton, J., *Lumley* v. *Gye*, 2 Ell. & Bl. 230; 22 Law J., Q. B. 463.
(*q*) *Guntor* v. *Astor*, 4 Moore, 15.
(*r*) *Winsmore* v. *Greenbank*, Willes, 580.
(*s*) 25 & 26 Vict. c. 100, s. 55. *Reg.* v. *Timmins*, 30 Law J., M. C. 45. *Reg.* v. *Manktelow*, 22 ib. 115.

of kin, &c., to any one having such interest, out of the possession, and against the will, of her father or mother, or other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, may be indicted for felony; and, if convicted, he is incapable of taking any estate or interest in any property of the woman, or in which she shall have any interest, or which may come to her as heiress, coheiress, or next of kin, &c. (*t*).

(*t*) 24 & 25 Vict. c. 100, s. 53.

CHAPTER XX.

OF ACTIONS EX DELICTO—PARTIES THERETO—NON-JOINDER AND MIS-JOINDER OF PARTIES.

SECTION I.—*Parties to be made plaintiffs in actions ex delicto.*—Parties to be made plaintiffs in particular actions—In actions of tort founded on contract—Remedies of tenants-in-common and joint-tenants against each other—Rights of the survivor—Trustee and cestui que trust—Public boards, corporations, and joint-stock companies—Owners and bailees of goods—Master and servant—Husband and wife—Actions by married women after a judicial separation, or an order for protection—Actions by infants, heirs-at-laws, devisees, and personal representatives—Actions by administrators and assignees of bankrupts—Number of the plaintiffs—Joint and separate rights of action.

SECTION II.—*Parties to be made defendants in actions ex delicto.*—Liabilities of tenants-in-common, corporate bodies, public boards, joint-stock companies, trustees and commissioners, public officers, master and servant, principal and agent—Subsequent ratification and adoption of a wrongful act—Liabilities of employer and contractor—Servants—Joinder of husband and wife as defendants—Liabilities ex delicto of infants—Liabilities of executors or administrators for wrongs committed by their testator or intestate, and for their own wrongful acts—Liabilities of assignees in bankruptcy—Liability of a bankrupt after his bankruptcy—Number of the defendants.

SECTION III.—*Of the non-joinder and mis-joinder of parties.*—Amendment before and at the trial—Misjoinder of defendants in actions tort founded on contract—Plea in abatement for non-joinder—Amendment.

SECTION I.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE PLAINTIFFS IN SUCH ACTIONS.

Parties to be made plaintiffs in particular actions have already been considered—such as actions for wrongful acts interfering with the beneficial use and employment of landed property (ante, pp. 53, 54), or obstructing the enjoyment of easements, profits *à prendre*, and incorporeal rights over land (ante, pp. 120–122), actions for nuisances (ante, pp. 168–171), injuries from fire (ante, p. 212), trespasses upon lands and tenements (ante, pp. 241–243), trespass and conversion of chattels (ante, pp. 304–307), negligence (ante, pp. 340–344), detention and loss of chattels by

bailees (ante, pp. 376–379), and carriers (ante, pp. 421–424), actions for unlawful and excessive distresses (ante, pp. 468, 469), actions for assault and battery and wrongful imprisonment (ante, pp. 503–506), actions for malicious arrest and prosecution (ante, pp. 535, 536), actions against sheriffs (ante, pp. 578–580), actions against justices (ante, pp. 639, 640), actions for libel and slander (ante, pp. 713, 714), actions for fraudulent misrepresentation and deceit (ante, pp. 758–761).

Parties to be made plaintiffs in actions of tort founded on contract.—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action upon a tort. Both the non-feazance and the mis-feazance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured (*u*). Whenever the goods and chattels or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury to the chattels and materials, from the negligent execution of the work, forms a ground of action upon a tort as well as upon a contract. So, if I deliver goods to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods (*x*).

But it is said to be a rule of law that, wherever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter (*y*). Thus, where the defendant had contracted with the Post-master-General to supply a certain number of stage-coaches, and keep them in good working order and condition, and fit for the road, and, through his neglect to do the necessary repairs, one of the coaches broke down and injured the coachman, it was held that the coachman could not maintain an action against the coachmaker, as the negligence and breach of duty on the part of the coachmaker were grounded purely upon a breach of contract, and the coachman was neither a party nor privy to that contract (*z*). But every person who exercises an employment is bound, as we have seen, to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another (ante, pp. 340–344). If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the party

(*u*) *Boorman* v. *Brown*, 3 Q. B. 526; 11 Cl. & Fin. 1.

(*x*) *Coggs* v. *Bernard*, Smith's Leading Cas. 92, 93.

(*y*) *Tollit* v. *Sherstone*, 5 M. & W. 288.

(*z*) *Winterbottom* v. *Wright*, 10 M. & W. 115. *Blakemore* v. *Brist. & Exeter Rail. Co.*, 8 Ell. & Bl. 1049; 27 Law J., Q. B. 167; ante, pp. 12, 13.

to be made plaintiff in an action for the neglect of duty; but if the person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the party to be made plaintiff (ante, pp. 342–344).

Every person who enters upon the performance of the work of carrying merchandise or passengers, is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously, and every person who has been injured by the negligent performance of the work of carrying is entitled, as we have seen, to an action against the carrier, although he is no party to the contract under which the work was done (*a*).

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a mis-feazance (*b*).

If a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous, as a loaded gun, which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he negligently places it in an improper situation, easily accessible to a third person, who sustains damage from it, not supposing that a loaded gun would have been placed in such a spot (*c*).

Whenever an action of tort is founded upon a contract, it proceeds upon the assumption that the contract is good in law, and can be enforced by action; if, therefore, the contract is verbal when by law it is required to be in writing, no duty is created by it, and an action founded upon such contract is not maintainable (*d*).

(*a*) *Collett* v. *Lond. & North-West. Rail. Co.* *Marshall* v. *York, &c.*, ante, p. 422.

(*b*) Parke, B., *Longmeid* v. *Holliday*, 6 Exch. 767. *Gladwell* v. *Steygall*, 8 Sc. 67; 5 Bing. N. C. 733.

(*c*) Parke, B., *Longmeid* v. *Holliday*, 6 Exch. 767. *Dixon* v. *Bell*, 5 M. & S. 198.

(*d*) *Carrington* v. *Roots*, 2 M. & W. 255.

Of the remedies which tenants-in-common and joint-tenants have against each other.—If two several owners of houses have a river or stream in common, and one of them corrupts it, the other shall have an action against him for damages. And whenever one tenant-in-common misuses the common property, or commits waste, he is responsible to his co-tenant in common for the injury he has done. If there be two tenants-in-common of a wood, and one of them leases his part to the other, who cuts down young timber trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted: but one tenant-in-common cannot maintain an action in the nature of waste against the other, for cutting down trees of a proper age and proper growth, for this is no injury to the inheritance; but he is entitled, in an action of account, to recover a moiety of the value of the tree (*e*).

By the common law, joint-tenants and tenants-in-common had no remedy against each other where one alone received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion, unless he actually made him so; but by 4 & 5 Anne, c. 16, it is provided, that joint-tenants and tenants-in-common, and their executors and administrators, may have an account against the others as bailiffs, for receiving more than comes to their just share or proportion.

Rights of the survivor of two joint-tenants or tenants-in-common.—In case of the death of two joint-tenants of lands or chattels, the whole interest in the property passes, as we have seen, to the survivor; but in the case of the death of one of two tenants-in-common of real property, the share and interest of the deceased passes to his heir-at-law, and in the case of a tenancy-in-common of chattels, to the personal representatives of the deceased. But in the case of the death of one of two tenants-in-common of a patent, the right of action for infringement of the patent in the life-time of the deceased tenant-in-common survives to the other, and the latter is consequently entitled to recover the whole of the damages (*f*).

Trustee and cestui que trust.—In the case of a permanent injury to real property in the occupation of a tenant to whom it has been demised by a *cestui que* trust, the trustee in whom the legal estate in reversion is vested is the proper party to sue for the injury to the reversion, and not the *cestui que* trust, who has only an equitable interest. "The *cestui que* trust," observes Tindal, C. J., "has no interest in law; if he enters, his possession is considered the possession of the trustee, and any disposition made by him and adopted by the trustee is considered the disposition of the trustee" (*g*).

Trustees of public works, boards of health, and corporate bodies are

(*e*) *Martyn* v. *Knowllys*, 8 T. R. 145; ante, pp. 200, 241.

(*f*) *Smith* v. *Lond. & North-West. Rail. Co.*, 2 Ell. & Bl. 69.

(*g*) *Vallance* v. *Savage*, 7 Bing. 599.

entitled, as we have seen, to sue either in their corporate name or in the name of their clerk, treasurer, or some public officer, according to the provisions of special acts of parliament, clothing them with particular statutory powers (ante, p. 673).

Owners and bailees of goods.—We have seen that many persons who have only a special property in goods may maintain an action for damages done to them, or for the conversion, detention, or loss of them (ante, pp. 304–307, 378): such as a carrier, who is the mere instrument of conveyance, or a workman, to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shopkeeper, to whom they have been sent to sell (*h*), or the master of a vessel, or of a canal boat, who is intrusted with the possession and management of the vessel or boat, and its tackle and furniture (*i*), and many others to whom goods have been delivered for a special purpose, and who do not pretend to any absolute property in them (*k*).

Master and servant.—The master is entitled, as we have seen, to maintain an action for damages for a personal injury to his servant, whereby he has been deprived of the services of the latter, and for expenses incurred by him in curing his servant's personal injuries, and recovering the benefit of his services. "Courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages" (*l*). The master may claim, and will be entitled to recover, damages not only for the loss of the services of his servant up to the time of the commencement of the action, but, if the servant continues disabled, down to the time when it appears by the evidence that the disability may be expected to cease (*m*). A parent whose child was, before the injury it sustained, capable of performing acts of service, may, as we have seen, maintain an action for damages for the loss of the services of the child, if he can prove that the child was living with him, and rendered him some sort of personal service (*n*). The servant himself, also, is entitled to an action for the damage he has sustained by the tortious act: for loss of wages, bodily pain, and the expenses he has incurred in procuring medical advice and medicine, food, and lodging, which would otherwise have been provided for him by his master. The servant himself who sustains bodily pain and anguish, is the only party entitled to damages in respect thereof (*o*).

(*h*) *Williams* v. *Millington*, 1 H. Bl. 84. *Colwell* v. *Reeves*, 2 Campb. 576.

(*i*) *Pitts* v. *Gaince*, 1 Salk, 10. *Moore* v. *Robinson*, 2 B. & Ad. 817.

(*k*) *Martini* v. *Coles*, 1 M. & S. 147.

(*l*) Abbott, C. J., *Hall* v. *Hollander*, 4 B. & C. 663; ante, pp. 803, 804.

(*m*) *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 301; post, ch. 22. PROSPECTIVE DAMAGES.

(*n*) Ante, pp. 804, 808. *Hall* v. *Hollander*, 4 B. & C. 662.

(*o*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 736.

Husband and wife.—If a man marries a woman seised in fee of certain lands and tenements, he gains a freehold interest therein in right of his wife; and if he is the actual occupier of them, he is, of course, entitled to sue for all damage done to his beneficial occupation and enjoyment of the property. If the wife, on her marriage, was possessed of chattels real, such as leasehold interests, estates by statute merchant, statute staple, &c., the husband will be entitled to them as a gift in law, and may, during the marriage, deal with them as the absolute owner of them; but if he fails to make any transfer or disposition of them in his lifetime, and his wife survives him, she will then take them by survivorship. The husband cannot devise them, but he may transfer them by deed (*p*). If the wife's estates have, prior to the marriage, been conveyed to trustees, the husband will then have no legal interest in the property, and no right to maintain an action for any damage that may be done to it.

If the husband, having an interest in the wife's real estate, grants leases thereof during their joint lives, reserving rent to himself and making his wife no party to the lease, then, as the reversion is in the husband, he is the proper party to sue for damage done to his reversionary estate (*q*), and for double value under 4 Geo. 2, c. 28, for holding over by tenants after notice to quit (*r*). If a *feme sole* hath a right to have common for life, and she marries, and the husband is hindered in his enjoyment of the right of common, he alone may have an action for damages (*s*).

Joinder of husband and wife as plaintiffs.— Actions for the conversion of the goods of a *feme covert* before her marriage, and for wrongs done to her before marriage, should be brought by the husband and wife jointly; as the chose in action in case of the death of the husband would survive to the wife; and if the wife sues alone on such chose in action, she will be entitled to damages, unless the non-joinder of the husband is pleaded in abatement (*t*). The marriage operates, as we have seen, as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife. The husband, therefore, after the marriage, may demand possession of the chattels of the wife in the hands of a stranger; and if the latter has no lien upon them or right to detain them, and refuses or neglects to deliver them up to the husband, the latter may maintain an action for the detention or conversion of them without joining the wife, as the tort is to the husband: but if the action is brought for the conversion of deeds and securities relating to property and choses in action which would survive to the wife in case of the death of the hus-

(*p*) Bac. Abr., BARON AND FEME, C.
(*q*) *Wallis* v. *Harrison*, 5 M. & W. 142.
(*r*) *Harcourt* v. *Wyman*, 3 Exch. 824; 18 Law J., Exch. 453; ante, p. 241.
(*s*) *Baker* v. ——, 2 Bulstr. 14.
(*t*) *Milner* v. *Milnes*, 3 T. R. 627. *Morgan* v. *Cubitt*, 3 Exch. 612. *Dalton* v. *Mid. Count. Rail. Co.*, 13 C. B. 474.

band, the wife would be properly joined with the husband for conformity (*u*).

So absolute is the husband's right to all chattels and personal property which come to his wife's hands after marriage, that if the wife buys wearing apparel out of money settled to her separate use, and received by her from her trustees, such wearing apparel vests by law in the husband as the legal owner thereof; and the same rule prevails with regard to money and all kinds of personalty, as soon as it is placed by the trustees in the hands of the wife in the execution of the trusts (*x*). In actions for the recovery of damages for a personal wrong or violence done to the wife, where the action would survive to her in the case of the death of her husband, the wife ought to be joined as a plaintiff, although the declaration sets forth and claims some special damage accruing to the husband; but where there is no injury to the person of the wife, and the action would not survive to her, the wife ought not to be joined, she having no legal interest in the damages to be recovered (*y*). The husband, for example, is alone entitled to sue for the loss of the services of his wife through the tortious act of the defendant, and for the expenses he has incurred in doctors and nurses in curing her of injuries resulting from an assault upon her by the defendant; but when damages are sought to be recovered for the bodily pain suffered by the wife from personal violence, or for injury to her personal feelings from slanderous attacks upon her, the wife must be a plaintiff in the action, and the husband be joined with her for conformity (*z*).

By the old law, therefore, it was often necessary to bring separate actions for the recovery of the entire damage resulting from an injury to the person of the wife, in one of which the husband alone was made plaintiff, and in the other the wife was joined for conformity; but now, by the Common Law Procedure Act, 1852, s. 40, it is enacted, that in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit; but it is provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

If a defendant has been guilty of a fraudulent representation that a chattel is fit for use, knowing that it is not, and making the representation in order that the chattel may be used by the plaintiff's wife, and the wife uses it and is injured, both the husband and wife may be

(*u*) *Ayling* v. *Whicher*, 6 Ad. & E. 259.
(*x*) *Carne* v. *Brice*, 7 M. & W. 183. *Bird* v. *Peagrum*, 13 C. B. 649.
(*y*) *Saville* v. *Sweeny*, 4 B. & Ad. 523.
(*z*) *Dengate* v. *Gardiner*, 4 M. & W. 6.

properly joined in an action for the deceit, but the wife cannot be joined with the husband where the action is founded merely on a breach of warranty without proof of wilful deceit (*a*). If a party professing to sue as the husband of an injured female is not in truth her husband, he has no right to maintain the action. It is a good plea in bar, therefore, to an action professing to be an action by husband and wife for an injury done to the wife, to plead that the female plaintiff is not the wife of the male plaintiff (*b*).

Where husband and wife were seised of a messuage for their joint lives and the life of the survivor, and all the estate and interest of the husband became vested in the defendant, who permitted waste during the lifetime of the husband, it was held that the wife, who survived her husband, could not maintain an action against the defendant in respect of such waste (*c*).

Actions by married women after a judicial separation, or an order for protection.—When a married woman is living separate from her husband under a decree for a judicial separation, she is considered as a *feme sole* for the purpose of suing for damages for any wrong or injury that she may have sustained (*d*). But until a decree for a judicial separation has been obtained, she ought, although she is living apart from her husband, to sue in his name for any trespass that may have been committed in her dwelling-house (*e*).

Infants have a right to sue by guardian or *prochein ami* to recover damages for injuries done to their persons or property through the tortious act of another.

Heir-at-law, devisee, and personal representatives.—All causes of action in respect of injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representative, in whom the legal estate in the land may be vested by deed, will, or administration (*f*).

The heir-at-law is the proper party to maintain an action for the entire damage resulting from a nuisance of a continuing nature to land which comes into his possession by descent. Thus, where one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs-at-law, and the heir of Richard, on request made to him by the heir of John, did not reform the wrong, whereupon the latter brought an action against the

(*a*) *Longmeid* v. *Holliday*, 6 Exch. 761.

(*b*) *Chantler* v. *Lindsey*, 16 M. & W. 82.

(*c*) *Bacon* v. *Smith*, 1 Q. B. 345.

(*d*) 20 & 21 Vict. c. 85, s. 26; ante, pp. 778, 781.

(*e*) *Boggett* v. *Frier*, 11 East, 301.

(*f*) *Vivian* v. *Champion*, 2 Ld. Raym. 1126.

heir of Richard, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not on request reform the nuisance which his father had made, but suffered it to continue, to the prejudice and damage of the plaintiff, son and heir to him to whom the wrong was done (*g*).

So, where a nuisance erected on the land of a devisor in the lifetime of such devisor was continued afterwards in the time of the devisee, it was held that the devisee should have an action for it, for the continuance thereof is a new erecting of such nuisance (*h*). If the land or tenement is in the occupation of a tenant, the latter is, as we have seen, the proper party to sue for damages in respect of the immediate injury done to his possessory interest, and to his use and enjoyment of the property; and the heir must sue for the damage done to his reversionary estate (ante, pp. 53, 54, 120–122, 168, 169, 212, 241, 242).

When the reversionary interest of a deceased leaseholder, who has underlet the premises demised to him, becomes vested in his personal representatives, they are, of course, the proper parties to sue for damages in respect of permanent injuries to the property of a continuing nature, diminishing the value of their reversionary estate (ante, pp. 168, 241). When the damage done to real property was not of a continuing nature, but accrued wholly in the lifetime of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative, in consequence of the old maxim of the common law, *actio personalis moritur cum personâ*. Thus, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit; or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the ultimate damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him (*i*). But by 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, it is enacted, that an action of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person.

(*g*) 2 Hen. 4, 13; 31 Ed. 3, Voucher, 272, cited in *Penruddock's* case, 5 Co. 101a. *Gillon* v. *Boddington*, cited 5 B. & C. 268.

(*h*) *Some* v. *Barwish*, Cro. Jac. 231.

(*i*) *Adam* v. *Bristol*, 2 Ad. & E. 389. *Raymond* v. *Fitch*, 2 C. M. & R. 597.

On the death of an owner of goods and chattels in the hands of bailees and depositaries the right of property in the chattels vests in the personal representatives, and if the bailee has no lien upon them, or interest in them, or right to detain them as against the owner, the personal representatives may demand possession of them; and if the bailee refuses to deliver them he may be sued for the detention or conversion of the property (*k*). Being themselves the owners of the property on the death of the testator or intestate, they are the proper parties to sue in respect of trespasses committed by persons who take the goods out of their actual or constructive possession, or out of the custody of their servants or agents (*l*); but they cannot sue in respect of any detention or conversion of the property in the lifetime of the deceased owner, nor for a trespass in taking it away, by reason of the maxim *actio personalis moritur cum personâ*. To remedy this inconvenience, it was enacted by 4 Ed. 3, c. 7, that executors shall have actions for a trespass done to their testators in respect of the goods and chattels of the said testators carried away in their lifetime, and recover their damages in like manner as they whose executors they be should have had if they were in life. By 25 Ed. 3, c. 5, the benefit of this statute is extended to the executors of executors; and it has been held that administrators are within the equity of the statute. It has been held that an action is maintainable by executors upon this statute against a defendant for cutting down and carrying away a growing crop of wheat from the testator's land in his lifetime, because corn growing is a chattel; but that if the defendant had cut down the corn and let it lie, no action would have been maintainable by the executor; nor if the grass had been cut and carried away by the defendant, because the grass is part of the freehold (*m*).

As actions for personal wrongs die with the person, it follows that executors and administrators cannot maintain an action for a libel upon their deceased testator or intestate, or for an assault or false imprisonment, or any act of negligence or violence causing injury to the person, not ending in death. But if the declaration of the cause of action, though framed in tort, is in substance for a breach of contract which has damaged the personal estate of the testator, the action is maintainable, as the substance, and not the form, of the thing must be regarded. Thus, if a person contracts with a coach-proprietor to be safely and securely carried from one place to another, and through the negligence of the servant of such proprietor the coach be overturned, in consequence of which the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure, his personal property sustains an injury; although he, during his lifetime, might sue the

(*k*) *Hollis* v. *Smith*, 10 East, 292; ante, pp. 304–306, 376–380.

(*l*) *Adams* v. *Cheverel*, Cro. Jac. 113.

(*m*) *Emerson* v. *Emerson*, 1 Ventr. 187.

proprietor in *assumpsit* or tort, still his representative may after his death maintain an action on the contract to carry him safely, and recover damages for the injury which has accrued to his personal estate from the breach thereof. Where the plaintiff suing as administrator set forth in his declaration that the defendant was employed by the intestate in his lifetime to act as his attorney to investigate the title to an estate to be conveyed to such intestate as purchaser, that the defendant entered upon the employment, but neglected to investigate the title, and caused the intestate to accept a defective title by representing it to be a good title, showing special damage to the personal estate, it was held that the action was clearly maintainable, as the intestate in his lifetime might have sued in contract as well as in tort (*n*). But as regards personal injuries unconnected with contract causing the death of the party injured, it has been enacted, as we have seen, by the statute 9 & 10 Vict. c. 93 (ante, p. 338), that whenever the death of a person has been occasioned by any wrongful act, or by neglect or default, such as if death had not ensued would have entitled the injured party to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, to be brought in the name of the executor or administrator of the person deceased.

Actions by administrators—Title by relation.—An action is maintainable by an administrator for a wrongful seizure by the defendant of the intestate's goods made between the death of the intestate and the grant of the letters of administration (*o*); and an action is maintainable in respect of goods wrongfully sold after the death of the intestate, and before the grant of the letters of administration (*p*).

Assignees of bankrupts, with leave of the Court of Bankruptcy, and not otherwise, may commence and prosecute any action or suit which the bankrupt might have prosecuted, and the costs they are put to may be allowed out of the bankrupt's estate (*q*). In all actions by and against assignees of a bankrupt, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in any case to be considered in issue, unless it is specially denied (*r*).

Transfer of rights and liabilities ex delicto to assignees of bankrupts.—We have already seen that all the real and personal estate and effects (except copyhold) of bankrupts are vested in the assignees (ante, pp. 290–292). The assignees, therefore, are the proper parties to maintain an action for injuries done to real or personal property, which has become vested in them by reason of bankruptcy (*s*); but they cannot maintain an action for

(*n*) *Knights* v. *Quarles*, 4 Moore, 541.
(*o*) *Tharpe* v. *Stallwood*, 5 M. & Gr. 777.
(*p*) *Foster* v. *Bates*, 12 M. & W. 226.
(*q*) 12 & 13 Vict. c. 106, s. 153.
(*r*) Reg. Gen. Hil. T. 16 Vict., 1 El. & Bl. App. lxxix.
(*s*) *Michell* v. *Hughes*, 6 Bing. 689.

injuries to the person of the bankrupt. They cannot sue, for example, for damages for a libel upon him, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy; nor can they sue for damages for an assault upon the bankrupt, or for the seduction of his servant (*t*); and the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or to marry; and if in these cases a consequential damage to the personal estate follows from the injury to the person that may be so dependent upon, and inseparable from, the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the assignees. But where the primary and substantial cause of action is not, properly speaking, personal to the bankrupt, but the injury to the person is the consequence of an injury to the personal estate, the injury to the personal estate is the primary and substantial cause of action, and such right of action will pass to the assignees as part of the personal estate (*u*).

Where a plaintiff who had become bankrupt complained that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises certain of his lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held, that as the jury were entitled upon the declaration as it stood to give vindictive damages for the personal injury far beyond the mere value of the goods, a plea of the bankruptcy of the plaintiff, and of the transfer of the causes of action to the assignees, afforded no answer to the plaintiff's claim (*x*). "There is no doubt," observes Lord Campbell, "that a cause of action which is exclusively confined to injury to property will pass to the assignees, but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury sustained by him, and an action to the assignees for the injury done to the property" (*y*).

If the bankrupt, notwithstanding his bankruptcy, continues in the possession and occupation of land which has been demised to him, he may maintain an action for trespasses or injuries done to the land, if the assignees do not interpose and take the lease. But if he goes away and abandons the possession of the premises, he has no right of action (*z*),

(*t*) *Howard* v. *Crowther*, 8 M. & W. 601.

(*u*) *Drake* v. *Beckham*, 11 M. & W. 319.

(*x*) *Brewer* v. *Drew*, 11 M. & W. 625.

(*y*) *Rogers* v. *Spence*, 12 Cl. & Fin. 720.

(*z*) *Clark* v. *Calvert*, 8 Taunt. 752.

unless he returns and resumes possession with the assent of the assignees or the landlord, before any other person has entered and become the occupier of the property (*a*). If the assignees think fit to take to the lease, they are then the proper parties to sue for any trespass or injury committed upon the demised premises (*b*).

Right of the assignees to the bankrupt's wife's choses in action. — When a right of action of the bankrupt's wife is of such a character that if vested in the bankrupt alone, it would have passed to the assignees, such right of action passes to the assignees, subject to the condition that it is reduced into possession by them during the joint lives of the husband and wife, and that may be done in a joint action by the assignees and the wife (*c*).

Of the number of the plaintiffs in actions ex delicto — Joint and separate rights of action.—Joint-tenants of lands, and all persons having a joint interest in property, real or personal, should be joined as plaintiffs in actions for damages for injuries done to their joint property (ante, pp. 54, 169, 171, 306, 307, 340, 344). Tenants-in-common should, as we have seen, be joined as plaintiffs in actions for injuries to their common property, such as trespasses upon their land, nuisances to their estates, and for all trespasses and injuries to their common property; because, though their estates are several, yet the damages survive to all, and it would be unreasonable for them to bring several actions for one single injury (*d*). If a nuisance to the land of two tenants-in-common be continued after the death of one of them, the devisee of the deceased tenant-in-common should join the survivor in an action for such nuisance (*e*).

Assignees in bankruptcy and insolvency taking a joint interest as trustees of a bankrupt's or insolvent's estate should all be joined as plaintiffs in an action brought by them in their representative character in respect of injuries to such estate (*f*).

But parties cannot properly be joined as plaintiffs in an action where the wrong done to one is no wrong to the other, as in the case of false imprisonment, assault, and personal injuries (*g*). If slander is published concerning two partners, containing imputations injurious to them in their trade and affecting their joint interests, they may sue jointly for damages (*h*).

Provision is made, as we shall presently see (post, s. 3), by the Common Law Procedure Act, 1852, for amending a non-joinder or mis-joinder

(*a*) *Topham* v. *Dent*, 6 Bing. 515.
(*b*) *Hancock* v. *Caffyn*, 8 Bing. 367.
(*c*) *Richbell* v. *Alexander*, 30 Law J., C. P. 268.
(*d*) Ante, pp. 54, 169, 242. *Hare* v. *Celey*, Cro. Eliz. 143. *Some* v. *Barwish*, Cro. Jac. 231.
(*e*) Bac. Abr., *Joint-Tenants, &c.* K.
(*f*) *Snelgrove* v. *Hart*, 2 Stark. 424. *Jones* v. *Smith*, 1 Exch. 831.
(*g*) *Barratt* v. *Collins*, ante, p. 504.
(*h*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637; ante, p. 713.

of plaintiffs' either before or at the trial, upon such terms as the court or a judge may think proper.

By 23 & 24 Vict. c. 126, s. 19, it is enacted, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given, in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of mis-joinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

SECTION II.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE DEFENDANTS IN SUCH ACTIONS.

Parties to be made defendants in particular actions have already been considered; such as actions for the infringement of rights naturally incident to the possession and ownership of land (ante, p. 54), or for disturbance in the enjoyment of easements, privileges, and incorporeal rights (ante p. 122), actions for nuisances (ante, pp. 169–171), actions for trespasses and injuries to real property (ante, p. 242), and for the seizure and conversion of chattels (ante, p. 306), for injuries to the person and to property from negligence, and voluntary and involuntary trespasses (ante, pp. 340–344); for the loss of goods delivered to a bailee or common carrier, or his servants, to be carried (ante, pp. 423–425); goods wrongfully taken under colour of a distress for rent (ante, pp. 468, 469); actions for an assault and for false imprisonment (ante, pp. 504–506); for malicious arrest, malicious prosecution, and malicious abuse of legal process (ante, p. 535); for wrongs done under colour of legal process (ante, pp. 578–580); or a warrant of justices (ante, pp. 639, 640); or in the negligent execution of statutory powers or authorities (ante, p. 673); or for libel and slander (ante, pp. 713, 714); or fraudulent misrepresentation and deceit (ante, pp. 761–763).

Liabilities of tenants-in-common.—If one tenant-in-common misuse that

which he has in common with another, he is answerable to the other in an action as for misfeazance (*i*). He is responsible to his co-tenant-in-common, as we have seen, for cutting down trees, or pulling down walls, or the doing of any act tending to the lasting injury of the common property (*k*). An action for a trespass is maintainable by one tenant-in-common against his co-tenant-in-common for digging and carrying away brick-earth or turf, as it destroys the subject-matter of the tenancy-in-common, and amounts in contemplation of law to an actual ouster (*l*).

Liabilities ex delicto of corporations.—A corporation by accepting a grant of land from the crown upon certain conditions as to the repair of sea-walls and defences, may render themselves liable to an action of tort at the suit of any party sustaining any private and peculiar damage from the non-repair of such sea-walls, &c. (*m*). A corporation may also be made responsible in an action for a trespass in breaking and entering a close, and for seizing goods, for every corporate body is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation, without any order or authority under its common seal (*n*). A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress, and the jury may infer the agency of the corporation in the matter of a wrongful distress or seizure of goods from the fact of their having received the proceeds of the seizure (*o*).

An action for a wrong lies against a corporation where the thing done is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. Therefore, where an action was brought against the London General Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that as the company was incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration of the cause of action were acts connected with the driving of their vehicles along the public highway, and were, therefore, within the purpose of their incorporation, an action for damages was maintainable against them. "We think it extremely important," observes Erle, J., "where such companies admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom

(*i*) Ld. Kenyon, C. J. *Martyn* v. *Knowllys*, 8 T. R. 145.

(*k*) Holt. C. J., *Waterman* v. *Soper*, 1 Ld. Raym. 737. *Cubitt* v. *Porter*, ante, p. 230.

(*l*) *Wilkinson* v. *Haygarth*, 12 Q. B. 845.

(*m*) *Mayor, &c. of Lyme Regis* v. *Henley*, 1 Bing. N. C. 240.

(*n*) *Maund* v. *Monm. Rail. Co.*, 4 M. & Gr. 452; 5 Sc. N. R. 457.

(*o*) *Smith* v. *Birm. Gas Co.*, 1 Ad. & E. 526.

they have employed, and who may be entirely incapable of giving the recompense which the law may award" (*p*).

A corporation may become liable in damages for the improper and careless construction and management of dangerous premises and dangerous machinery (*q*); for an assault and battery, or false imprisonment, committed by its servants in the exercise of its orders, or in the discharge of their duty, without proof of any authority under seal from the corporation (*r*). But where a corporation have employed a solicitor to conduct legal proceedings, the corporation are not necessarily liable for unlawful acts of which the solicitor may have been guilty in the conduct of the proceedings (*s*). A corporation aggregate may, as we have seen, be made responsible for the negligence and unskilfulness of its servants in the execution of the ordinary work and business of the corporation, without any proof that the work was ordered under the common seal (*t*).

It has been thought that an action for a malicious prosecution is not maintainable against a corporation aggregate (*u*), but express malice may be imputed to, and proved against, a corporation, and an action of libel may consequently be maintained against a corporation for the publication of libellous intelligence through the medium of their servants, acting in the course of their ordinary employment in the management of an electric telegraph (*x*). If it be essential to the conversion of property by a corporation that the act of conversion should have been authorised by them under their common seal, a jury may, from proof that the conversion was committed by the servants and agents of the corporation in the exercise of their ordinary employment and service, presume that the act was done under the common seal (*y*). But in the case of corporations called into existence for trading purposes, and carrying on trade through the medium of their servants and agents, the corporation may be made responsible for a conversion of property by such servants and agents, acting in the ordinary course of their employment in the business of the corporation (*z*). If the wrongful act was not done by the servant or agent of the corporation in the exercise of his ordinary employment, or in discharge of his ordinary duties as servant of the corporation, it must be shown that the corporation has ratified and adopted the act.

(*p*) *Green* v. *Lond. Gen. Om. Co.*, 29 Law J., C. P. 13.

(*q*) *Cowley* v. *Mayor, &c. of Sunderland*, ante, p. 332.

(*r*) *Eastern Co. Rail. Co.* v. *Broom*, 6 Exch. 314. *Goff* v. *Gt. North. Rail. Co.*, ante, p. 496.

(*s*) *Eggington* v. *Mayor of Lichfield*, 5 Ell. & Bl. 112.

(*t*) *Scott* v. *Mayor, &c. of Manchester*, ante, p. 673.

(*u*) *Stevens* v. *Mid. Co. Rail. Co.*, 10 Exch. 352.

(*x*) *Whitfield* v. *S. E. R. Co.*, 27 Law J., Q. B. 229; 1 Ell. Bl. & Ell. 121.

(*y*) *Yarborough* v. *Bank of England*, 16 East, 6.

(*z*) *Giles* v. *Taff Vale Rail. Co.*, 2 Ell. & Bl. 831.

When a joint-stock company is responsible for the tortious acts of the directors and managers.—We have already seen that railway companies and joint-stock companies are responsible for the tortious acts of their directors and managers, when acting in the discharge of their official duties, and within the scope of their authority as the managers of the company (ante, pp. 496, 506). Where the plaintiff set forth that he was entitled to certain "ear-marked shares" in a railway company; that these shares had been wrongfully declared forfeited; that the forfeiture had been confirmed at a general meeting of the shareholders of the company, and the shares directed to be sold; it was held that there was a good cause of action against the company. So, where the directors had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, whereby the plaintiff was deprived of the ordinary privileges of shareholders, and of any profits that might have arisen upon the shares, it was held that the company was responsible for the wrongful act of the directors (*a*).

But where the directors have acted beyond the scope of their authority the company is not responsible for their acts, but the directors themselves are the parties to be made responsible in damages. Thus, where directors have signed false and fraudulent reports of the state and circumstances of a joint-stock company, such directors, and not the company, are the proper parties to be sued for the damages resulting from the misrepresentation. No body of shareholders can authorise directors to put forward fraudulent representations and false accounts of the transactions of the company, so as to render the company at large responsible for the fraud. That is a course which no body of shareholders could sanction against a single dissentient, or against a single absent shareholder. Where, therefore, false reports of the actual condition and circumstances of a joint-stock company were knowingly and designedly printed and circulated by the defendants and others in concert with them, with their signatures attached, and the plaintiff, relying upon the representations contained in these reports of the flourishing state of the concern, bought shares in it, and lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action for damages against the defendants (*b*).

Liabilities of trustees and commissioners of public works.—We have already seen that commissioners acting strictly in the execution of a statutory authority, and not exceeding their jurisdiction or powers, are not personally responsible, nor are their officers or servants acting under them personally responsible, in an action for damages to a private individual who has sustained damage from their authorised acts; but if they act in

(*a*) *Catchpole* v. *Ambergate, &c. Rail. Co.*, 1 Ell. & Bl. 120.

(*b*) Ante, pp. 741, 761. *Davidson* v. *Tulloch*, 8 W. R. 311; 36 Law T. R. 97.

a careless and oppressive manner, and are guilty of negligence or misconduct in the execution of the statutory authority, they are, as we have seen, responsible in damages for the consequences of their acts (*c*). Under certain acts of parliament, trustees and commissioners acting in the discharge of public duties are, as previously mentioned, relieved from all personal liability whilst acting in the execution of the powers of the statutes (ante, p. 652), but are charged with the duty of imposing rates and collecting a fund, out of which all the expenses incurred in carrying the act into execution are to be made good (ante, p. 654).

When it is provided by statute that commissioners or trustees appointed for the execution of public works shall be sued by their clerk, or treasurer, or public officer, an action is not maintainable against such officer, except where it could have been supported against the commissioners or trustees themselves (*d*); but whenever there has been a breach of duty on the part of the commissioners or trustees causing a private injury to another, an action is maintainable against their clerk or public officer to recover compensation for such breach of duty (*e*). The clerk is not in general personally liable to make compensation out of his own private means, he being only the nominal defendant; but the funds of the trustees or commissioners may be made answerable for satisfaction of the damages (*f*).

Public officers employed in the public departments, in the conduct and management of the public business of the country, are not, as we have seen, responsible for the negligence and misconduct of those who act under them (ante, p. 13). We have seen that a Queen's officer stationed on board ship to do his duty there, is not responsible for the negligent acts of his subordinate officers (ante, p. 329), nor is the Postmaster-General responsible for the negligence or misconduct of clerks and letter-sorters employed and appointed by him for the execution of certain public duties in the Post Office, but these public functionaries are responsible to every individual who sustains damage by reason of their own personal neglect or misconduct (ante, p. 14).

Military and naval commanding officers are not responsible for arrests made by them in the exercise and discharge of their military and naval authority (*g*); but if they exceed their authority, and make arrests for offences which are not military offences, and over which they have no jurisdiction or authority, they will be responsible in damages for their unlawful acts (*h*).

Master and servant.— The maxim, *qui facit per alium facit per se*,

(*c*) Ante, pp. 646–656. *Boulton* v. *Crowther*, 2 B. & C. 706. *Sutton* v. *Clarke*, 6 Taunt. 43. *Harris* v. *Baker*, 4 M. & S. 29.

(*d*) *Hall* v. *Smith*, 2 Bing. 158.

(*e*) *Cane* v. *Chapman*, 5 Ad. & E. 647.

(*f*) *Wormwell* v. *Hailstone*, 6 Bing. 676.

(*g*) *Bradley* v. *Arthur*, 4 B. & C. 305.

(*h*) *Warden* v. *Bailey*, 4 Taunt. 67.

renders the master liable, as we have already seen, for all the negligent acts of the servant in the course of his ordinary employment (*i*).

Principal and agent.— In order to make the principal liable in tort for an injury caused by the wrongful act of the agent, it must be shown that the act was within the scope of the authority given by the party against whom the action is brought, for if the servant was not acting in the due course of his employment for his master, but in contravention of his duty to him, and against his interest, the master is not, as we have seen, responsible for the consequences of the act (*k*). Where a railway passenger was taken into custody by a railway servant by command of a superintendent, for travelling on the railway without having paid his fare, with intent to avoid payment thereof (*l*), and the charge fell to the ground, and an action was brought against the company for an unlawful imprisonment, it was held that they were liable in damages, for it must be presumed that a superintendent of traffic, or of police, and all officers in authority, upon the line, or at the station, had power on behalf of the company to determine whether the servant of the company should, or should not, arrest persons for criminal frauds upon the company (*m*).

We have already seen that a principal who knowingly makes a false and fraudulent representation through the medium of an agent, is answerable in tort for the deceit (ante, pp. 761, 762).

Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.—"He that receiveth a trespasser, and agrees to a trespass after it is done, is no trespasser," observes Lord Coke, "unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a precedent commandment, for in that case *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" (*n*). But to make the subsequent ratification equivalent to a precedent commandment, the act of trespass must have been committed in the name, and avowedly on behalf and for the benefit, of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in a situation to have originally commanded the act, then his subsequent assent does not make him a trespasser (*o*). "It is a known and well-established rule of law," observes Tindal, C. J., "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the

(*i*) Ante, pp. 20–22, 341–344. *Sharrod* v. *Lond. & N. W.*, 4 Exch. 585.

(*k*) *Coleman* v. *Riches*, 16 C. B. 104; 24 Law J., C. P. 125. *Udell* v. *Atherton*, ante, pp. 20, 324.

(*l*) 8 Vict. c. 20, ss. 103, 104.

(*m*) *Goff* v. *Gt. North. Rail. Co.*, 30 Law J., Q. B. 148, qualifying and explaining *Roe* v. *Birkenhead, Lanc. &c. Rail Co.*, 7 Exch. 41.

(*n*) Coke, 4 Inst. 317. Dallas, C. J., *Hull* v. *Pickersgill*, 1 B. & B. 282.

(*o*) *Wilson* v. *Barker*, 4 B. & Ad. 616; 1 N. & M. 409. *Nicoll* v. *Glennie*, 1 M. & S. 592.

principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority. Such was the precise distinction taken in the Year-Book, 7 Hen. 4, fo. 35, where it was held that if a bailiff took a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time." In accordance with this principle of law it has been held, "that where the sheriff acting under a valid writ of execution by the command of the court, and as the servant of the court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action ratifying and approving the taking, cannot alter the character of the original taking and make it a wrongful taking by the plaintiff in the original action" (*p*).

What amounts to evidence of ratification of a wrongful act.—But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name, and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong. Promises to make inquiries, expressions of disapprobation of the conduct of the agent, accompanied by offers of compromise and overtures to purchase peace by returning the property taken, or paying the value of it, are of themselves no evidence of a ratification of the wrongful act (*q*).

Employer and contractor.—We have already seen, that when a person intrusts the execution of work to a contractor, who exercises an independent employment, and selects and pays his own workmen, the originator of the work is not responsible in general for injuries arising from the incompetence of the contractor, or the negligent execution of the work (ante, pp. 342, 343), unless lands or tenements in the actual occupation of the defendant have thereby been made a nuisance and source of annoyance to the adjoining occupiers (ante, p. 169).

Liabilities ex delicto of servants and agents executing the orders of their masters and employers.—All persons procuring, commanding, aiding, or assisting in the commission of a trespass, are principals in the transaction, and persons assenting to a trespass after it has been done may also become trespassers. Both the master who commands the doing, and the servant

(*p*) *Wilson* v. *Tummon*, 6 Sc. N. R. 906; 6 M. & Gr. 242. *Woollen* v. *Wright*, ante, p. 579.

(*q*) *Roe* v. *Birkenhead, &c.*, 7 Exch. 36.

who does an act of trespass, may be made responsible as principals, and sued jointly for damages (*r*). A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser (*s*). Where an arrest has been made under process, which is afterwards set aside for irregularity, both the attorney who sued out the process and the client who set the attorney in motion may be sued for the assault and false imprisonment (ante, p. 506). The servant is, as we have seen, equally liable with the master in respect of his own personal participation in a wrongful act, and cannot discharge himself from liability on the ground that he acted under unavoidable ignorance and in obedience to his master's orders, nor can he justify under any authority from his master when his master had no authority in the matter (*t*). A servant may, as we have seen, be liable for a conversion to which he is a party, though he is acting in obedience to the commands of his master, and under authority from him (*u*). But a servant who has charge of goods received by him from his master is not, as we have seen, responsible for a conversion of them, merely because he refuses to give them up on the demand of a stranger (ante, p. 274).

Joinder of husband and wife as defendants.—The husband is by law answerable for all actions for which his wife stood attached at the time of the marriage, and also for all her torts and trespasses during coverture; but the action must be against them both jointly, for if she alone were sued, it might be a means of making the husband liable without giving him an opportunity of defending himself (*x*). The husband takes his wife with all her obligations and liabilities. If, therefore, at the time of her marriage she is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it, and he cannot get rid of the obligation by pleading ignorance, for it is his duty to make inquiry; nor by showing that his wife deceived him, or concealed the notice to quit (*y*).

The husband must be sued jointly with the wife for an assault or libel committed by the wife, or for the destruction or conversion of property by the wife, or for any act of trespass committed by her during the coverture (*z*). He continues answerable in damages to all persons who have been injured by the wrongful act of the wife so long as the rela-

(*r*) *Bates* v. *Pilling*, 6 B. & C. 38.
(*s*) Bro. Abr., TRESPASS, pl. 133, 256, 265.
(*t*) *Stephens* v. *Elwall*, 4 M. & S. 261. *Bennett* v. *Bayes*, 5 H. & N. 391; 29 Law J., Exch. 224; 8 W. R. 320.
(*u*) *Perkins* v. *Smith*, 1 Wils. 328. *Davies* v. *Vernon*, 6 Q. B. 443.
(*x*) Bac. Abr., BARON AND FEME, L.
(*y*) *Lake* v. *Smith*, 1 B. & P., N. R. 179.
(*z*) *Catterall* v. *Kenyon*, 3 Q. B. 315. *Keyworth* v. *Hill*, 3 B. & Ald. 686. *Draper* v. *Fulkes*, Yelv. 165.

tion of husband and wife continues, though they are living apart (*a*), unless they are separated under a decree of judicial separation, in which case the husband is not liable for the wife's tortious acts committed during the period of such separation (*b*).

The husband and wife are liable for frauds committed by the wife, unless the fraud is directly connected with the contract of the wife, and is the means of effecting it, and parcel of the same transaction, in which case the wife is not responsible, and the husband cannot be sued for it. An action, for example, will not lie against husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried at the time of her signing a promissory note as surety for him to a third person, whereby he was induced to advance a sum of money to that person (*c*).

Where a married woman signed and delivered a distress-warrant to a bailiff, and directed him to distrain the goods of a tenant, under the impression that she had a right to distrain when she had no such right, and the plaintiff having been sued and compelled to pay damages for the illegal distress, brought an action of tort for deceit against the wife and her husband, it was held that the action was not maintainable, as it was not founded upon an alleged assertion of the wife that she had a right to distrain, and there could be no retainer of the plaintiff to distrain given by the wife, nor any contract by her to indemnify him (*d*).

Whenever both husband and wife are jointly concerned in the commission of a wrongful act, both are liable, whatever may be the result as to damages, in case the wife should survive her husband (*e*).

The husband of an executrix or administratrix is liable in respect of all assets received and wasted, and devastavits committed by himself or by his wife during the coverture, and his estate remains liable after his death (*f*).

After the death of the wife the surviving husband is discharged from all responsibility for her tortious acts, unless he himself participated therein, or authorised or instigated them, in which case he will be responsible, like any other master who has committed a tortious act through the medium of his servant. After the death of the husband the wife may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them or whether they were committed by her at the instigation or under the influence and direction of her husband (*g*). And the same rule of law prevails where the husband has abjured the realm, or been transported, and is thereby *civiliter mortuus* (*h*).

(*a*) *Head* v. *Briscoe*, 5 C. & P. 484.
(*b*) 20 & 21 Vict. c. 85, s. 26.
(*c*) *Liverpool Adelphi Loan, &c.* v. *Fairhurst, Wright* v. *Leonard*, ante, p. 30.
(*d*) *Rawlings* v. *Bell*, 1 C. B. 959.
(*e*) *Vine* v. *Saunders*, 4 Bing. N. C. 99.
(*f*) *Smith* v. *Smith*, 21 Beav. 385.
(*g*) *Vine* v. *Saunders*, 4 Bing. N. C. 102.
(*h*) Bac. Abr., BARON AND FEME, M.

Of the liability of married women for wrongs done by them after a judicial separation.— In every case of a judicial separation, the wife so separated is considered a *feme sole*, for the purpose of being sued for wrongs and injuries done by her, and her husband is not liable for any wrongful act or omission by her (*i*).

Liabilities ex delicto of infants.— An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbour, arising from the negligent use and management of the property. A man who has made a contract with an infant cannot convert anything that arises out of that contract into a tort, and seek to enforce the contract through the medium of an action of tort. Therefore, where a lad hired a mare, and injured it by immoderate riding, it was held that a plea of infancy was an answer to the action, the action being founded on a contract (*k*). But where a horse is hired for one purpose and is used for another, or is let out to be used by one person, and he allows it to be used by another, there is a tort independent of contract. And, therefore, where an infant hired a horse on the terms that it was to be ridden on the road and not over fences in the fields, and the infant having got possession of the horse lent it to a friend, who took it off the high-road, and in endeavouring to jump the animal over a hedge transfixed it on a stake and killed it, it was held that the infant was responsible in damages for the value of the horse (*l*).

An infant is not liable for conversion of goods if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort (*m*). Neither is he liable, as previously mentioned, to an action for a fraudulent representation or a breach of warranty (*n*); nor is he chargeable on the custom of the realm as a common innkeeper. But if an infant gets goods into his hands by fraud and false pretences, or under colour of a pretended contract, and then refuses to deliver up the goods on the demand of the party who has been defrauded of the possession of them, he cannot, if the goods were in his hands or under his control at the time they were demanded back, set up his minority as a defence to an action grounded on such demand and refusal (*o*).

Where an action for money had and received was brought against an infant to recover money which the infant had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action was in form an action of the latter description, yet it was *ex delicto* in point of

(*i*) 20 & 21 Vict. c. 85, s. 26.
(*k*) *Jennings* v. *Rundall*, 8 T. R. 335.
(*l*) *Burnard* v. *Haggis*, 32 Law J., C. P. 189.
(*m*) *Manby* v. *Scott*, 1 Sid. 120.
(*n*) Ante, p. 765. *Howlett* v. *Haswell*, 4 Campb. 118. *Green* v. *Greenbank*, 2 Marsh. 485.
(*o*) *Mills* v. *Graham*, 1 B. & P., N. R. 145.

substance; that if an action of trover had been brought for any part of the property embezzled, or an action grounded on the fraud, infancy would have been no defence; and that as the object of the action was precisely the same, his opinion was that the same rule of law should apply (*p*).

Liabilities of executors and administrators for wrongs committed by their testator or intestate.—An action does not in general lie at common law against executors to recover damages for waste committed by their testator, it being a tort which dies with the person (*q*). They are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrong-doer acquires no gain to himself from the commission of the wrong; but wherever by the wrong done property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. So far as the tort itself goes, an executor shall not be liable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged. Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter dies, his estate, in the hands of his executor, is answerable for the price, and an action for money had and received may be maintained against the executor for the recovery thereof (*r*).

Personal representatives are not responsible for a conversion or unlawful detention by their testator or intestate in his lifetime of another man's chattels, the private wrong being, as we have seen, buried with the offender. But where there has been a conversion of property by the deceased, which has benefited his personal estate, the personal representative may, in general, be sued in form *ex contractu*, founded on the tort. "Thus an action on the custom of the realm against a common carrier for not receiving and carrying goods, being for a tort, will not lie against an executor; but an action *ex contractu* for the same cause will lie. If a man take a horse from another, and bring him back again, an action for the trespass will not lie against his executor, but an action for the use and hire of the horse by the deceased may be maintained" (*s*). Where the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for him, and that the testator sold the cow, and converted and disposed of the money to his own use, it was held that the executor was not responsible in trover for the conversion of the beast by the testator, but that he might be made liable for the value of it in an action for money had and received (*t*).

(*p*) *Bristow* v. *Eastman*, 1 Esp. 172.
(*q*) 3 Inst. 301.
(*r*) *Powell* v. *Rees*, 7 Ad. & E. 428.
(*s*) *Hambly* v. *Trott*, Cowp. 375.
(*t*) *Bailey* v. *Birtles*, T. Raym. 71. *Perkinson* v. *Gilford*, Cro. Car. 530.

No action lies against an executor of a deceased sheriff, gaoler, or officer, for an escape suffered or permitted by his testator, or by reason of his testator's having neglected to attend and give evidence in a cause in obedience to a subpœna served upon him in his lifetime (*u*).

Wrongs committed by a deceased person within six months before his death. — By 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, it is enacted, that an action of trespass or case may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death; and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damage to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person. Where a watch was shown to have been in the possession of a testatrix more than six months before her decease, and she was asked within the six months to give it up, and wrongfully refused, this was held to be evidence of a conversion within six months of her death (*x*).

Actions against the executor of a prebendary, vicar, or incumbent of a benefice for dilapidations are maintainable where the prebendal-house, or the buildings, hedges, and fences belonging to the prebendary, vicarage, or benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel (*y*); but the incumbent of a vicarage cannot maintain an action against the executor of his predecessor for not cultivating the glebe-land in a husbandlike manner (*z*).

Actions against executors for a devastavit. — Formerly, if an executor committed a devastavit and died, the wrong died with him, so that his executor was not liable for it; but by 30 Car. 2, c. 7, and 4 & 5 Wm. and M. c. 34, s. 12, the executors or administrators of any executor or administrator, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable in the same manner as their testator or intestate would have been if they had been living.

Liabilities of executors and administrators for their own wrongful acts. — If a testator or intestate at the time of his death was in the possession of the goods and chattels of third parties, and had no lien upon them, and

(*u*) Williams on Executors, pt. 4, bk. 2.
(*x*) *Richmond* v. *Nicholson*, 8 Sc. 137.
(*y*) *Radcliff* v. *D'Oyly*, 2 T. R. 630.
Wise v. *Metcalfe*, 10 B. & C. 312; 1 Saund. 216a, note a; ante, pp. 198–200.
(*z*) *Bird* v. *Relph*, 4 B. & Ad. 830.

these goods come into the possession of his personal representatives after his decease, or under their dominion and control, and they refuse to give them up to the owners on demand made by the latter, they are responsible in damages for a conversion or unlawful detention of the property. But those only who have been guilty of the tort should be made defendants. Thus, if there are three executors, and one only of the three has got possession of, or has meddled with, the goods of the plaintiff, that one alone should be sued.

Liabilities of assignees in bankruptcy. — Assignees of the estate and effects of bankrupts may, with leave of the court and not otherwise, defend any action or suit which the bankrupt might have defended, and in such case their costs may be allowed out of the bankrupt's estate. Assignees of a bankrupt lessee are not liable as assignees of a lease unless they have done some act which unequivocally indicates that they have elected to take the lease. No general rule can be laid down as to the effect of their remaining in possession of the demised premises, or paying rent for them. Each case must be determined by the peculiar circumstances belonging to it. When these are equivocal, the lessor should avail himself of the power given by the Bankrupt Act to apply to the Court of Bankruptcy that the assignees may be put to their election (*a*).

Of the continued liability of a bankrupt to actions ex delicto.—The bankrupt acts do not exempt a bankrupt from actions for damages in respect of wrongs done by him prior to, or during the bankruptcy, for the damages do not constitute a debt until they have been assessed by a jury, and judgment for them has been obtained (*b*). If the action has been tried, and damages recovered, before the granting the certificate, so that the amount has become a judgment-debt provable against the estate, then the certificate will be a bar to further proceedings thereon (*c*).

Of the number of the defendants in actions ex delicto—Parties jointly and severally liable.—Whoever wilfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; and when several persons have been jointly concerned in the commission of a wrongful act, they may in general, as we have seen, all be charged jointly as principals, or the plaintiff may sue any of the parties upon whom individually a separate trespass attaches (*d*).

Torts are in their nature several, and in all actions of tort, therefore, one defendant may be acquitted and others found guilty.

In the case of actions for the wrongful conversion of property, several

(*a*) *Goodwin* v. *Noble*, 8 Ell. & Bl. 587; 27 Law J., Q. B. 204.

(*b*) *Lloyd* v. *Peell*, 3 B. & Ald. 408. *Parker* v. *Crole*, 5 Bing. 63. *Parker* v. *Norton*, 6 T. R. 699.

(*c*) *Longford* v. *Ellis*, 1 H. Bl. 29, n. *Greenway* v. *Fisher*, 7 B. & C. 436.

(*d*) Ld. Kenyon, C. J., *Mitchell* v. *Tarbutt*, 5 T. R. 651. *Sutton* v. *Clarke*, 6 Taunt. 29.

parties may be joined as defendants, and one or more of them be found guilty and the rest acquitted; and unless all are implicated in a joint conversion, all cannot be found guilty (*e*). But where the action, though for a tort, is founded on a contract, and several defendants are sued jointly, it has been doubted whether one can be acquitted and another found guilty (*f*). Where an action was brought against two defendants for deceit, alleged to have been committed in a joint sale by them of some sheep, and the declaration set forth that the defendants sold to the plaintiff some sheep, their joint property, and warranted them to be sound, and they proved to be unsound, and there was no evidence to affect one of the defendants, it was held that the action was founded on the joint contract of both, and that one defendant could not be acquitted and the other found guilty (*g*).

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a mis-joinder of defendants may be amended either before or at the trial (post, s. 3).

Where an action has been brought against several joint-trespassers, the evidence must be confined to the joint offence in which all are implicated. The plaintiff cannot recover for what was done by one or more before or after the joint act (*h*); and when an action is brought for one joint-trespass, and the plaintiff elects to go for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not then concerned in the trespass then committed, the plaintiff cannot have recourse to a trespass committed at a future time, when some of the defendants were concerned who were not implicated in the first transaction (*i*), for some of the defendants might be thereby subjected to damages for a trespass wherein they had no part or concern (*k*); but if he fails in proving a joint-trespass by all on the day he at first selects, he is at liberty to abandon that trespass and to prove a joint-trespass at another period (*l*).

When the plaintiff's evidence discloses no joint-trespass committed by all the defendants, but only separate trespasses by each, the plaintiff may be put to his election against which of the several defendants he will proceed (*m*).

One of several partners cannot, as we have seen, drag the firm or his co-partners into a trespass by signing a warrant or authority for the doing a wrongful act in the name of the firm of which he is a member; for one partner has no authority to bind the partnership to the commission of a

(*e*) *Nicoll* v. *Glennie*, 1 M. & S. 588.
(*f*) *Pozzi* v. *Shipton*, 8 Ad. & E. 975.
(*g*) *Weall* v. *King*, 12 East, 452.
(*h*) *Aaron* v. *Alexander*, 3 Campb. 35.
(*i*) *Sedley* v. *Sutherland*, 3 Esp. 204.
(*k*) Ibid. *Tait* v. *Harris*, 6 C. & P. 73.
(*l*) *Roper* v. *Harper*, 5 Sc. 250; 4 Bing. N. C. 20.
(*m*) *Howard* v. *Newton*, 2 Mood. & Rob. 510.

wrongful act without the previous consent or subsequent concurrence of all the partners (*n*). If the act is done by the one partner for the benefit of the firm, and the firm afterwards take advantage of the act, and adopt the transaction, they may then, as we have seen, become responsible for it.

SECTION III.

OF NON-JOINDER AND MIS-JOINDER OF PARTIES — AMENDMENT BEFORE AND AT THE TRIAL.

By 23 & 24 Vict. c. 126, s. 19, it is provided, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favour of such one or more of the plaintiffs as shall be adjudged by the court to be entitled to recover; but the defendant, though unsuccessful, is entitled to the costs occasioned by joining any person in whose favour judgment is not given, unless otherwise ordered by the court or judge. This section applies only to cases where there was fair ground to believe that there was a joint cause of action vested in all who are joined as plaintiffs. It does not enable two or more persons to join in a speculative sort of action, saying, one or other of us is entitled to recover, but not both (*o*).

Amendment of non-joinder and mis-joinder before trial. — By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 34), it is enacted, that "it shall be lawful for the court or a judge, at any time before the trial of any cause, to order that any person not joined as plaintiff shall be so joined, or that any person originally joined as plaintiff shall be struck out, if it shall appear that injustice will not be done by such amendment, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as

(*n*) *Petrie* v. *Lamont*, C. & M. 96. (*o*) *Bellingham* v. *Clark*, 1 B. & S. 332.

aforesaid, be the same as if such person had been originally joined in such cause."

Amendment at the trial.—It is further enacted (15 & 16 Vict. c. 76, s. 35), that in case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person, not joined as plaintiff, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person, such mis-joinder or non-joinder may be amended as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at *nisi prius*, or other presiding officer, in like manner as in the case of amendments of variances under the statute 3 & 4 Wm. 4, c. 42, if it shall appear to such court, or judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action. And by s. 222, further powers of amendment (post, ch. 20, s. 2) are given, enabling fresh plaintiffs to be added in certain cases, in order to bring the real question in dispute before the court (*p*), but not a fresh defendant (*q*). The court will not add a party to the record as plaintiff if he is trustee to a person who objects to his being added (*r*).

Amendment after notice or plea in abatement of non-joinder of parties.—It is also enacted (15 & 16 Vict. c. 76, s. 36), that in case notice of non-joinder be given, or any plea in abatement of non-joinder of a person as co-plaintiff, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name of the person named in such notice or plea in abatement, and proceed in the action without any further appearance, on payment of the costs occasioned by such amendment; and, in such case, the defendant shall be at liberty to plead *de novo*.

Mis-joinder of defendants in actions of tort founded on contract—Amendment before or at the trial.—The acquittal of one defendant in an action

(*p*) *Blake* v. *Done*, 31 Law J., Exch., 102.

(*q*) *Garrard* v. *Guibelei*, 31 Law J., C. P. 131; ib. 270.

(*r*) *Sturgis* v. *Smith*, 5 L. T. R., N. S. 586.

founded on neglect of duty and not upon breach of promise, does not affect the right of the plaintiff to have his judgment as against the defendant against whom the verdict has been obtained (*s*). By 15 & 16 Vict. c. 76, s. 37, it is enacted, that it shall be lawful for the court or a judge, in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge, by whom such amendment is made, shall think proper; and in case it shall appear at the trial of any action on contract that there has been a mis-joinder of defendants, such mis-joinder may be amended as a variance at the trial, in like manner as the mis-joinder of plaintiffs (ante, p. 840), and upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper.

Under the power of amendment given by this section, a mis-joinder of defendants may be amended at the trial, by striking out the name of a defendant against whom judgment by default has been signed (*t*). But the section applies only where the party has been erroneously joined, not where the question of his liability has been left to the jury and a verdict has been given in his favour (*u*). The court will not review the discretion of the judge where he has refused to amend, but will control an improper exercise of the power of amendment (*x*).

Plea in abatement for non-joinder of defendants—Amendment of proceedings.—It is also enacted (15 & 16 Vict. c. 76, s. 38), that in any action on contract where the non-joinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint-contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement. But it is provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement, and the plaintiff, be considered for all purposes as the commencement of the action.

The effect of marriage, death, and bankruptcy upon the proceedings in an action is provided for and regulated by the Common Law Procedure

(*s*) *Govett* v. *Radnidge*, 3 East, 62.
(*t*) *Greaves* v. *Humphreys*, 24 Law J., Q. B. 190.
(*u*) *Wickens* v. *Steel*, 2 C. B., N. S. 492; 26 Law J., C. P. 241.
(*x*) *Holden* v. *Ballantine*, 29 Law J., Q. B. 148; 8 W. R. 300; 36 L. T. R. 149.

Act, 1852 (15 & 16 Vict. c. 76, ss. 135–142). The right of a personal representative of a deceased plaintiff to continue the action by entering a suggestion of the death upon the record (s. 137), applies only to such causes of action as would have survived to the personal representative, and not where the cause of action died with the plaintiff at common law, and a perfectly new right has by statute been given to the personal representative, as under Lord Campbell's act, 9 & 10 Vict.c. 93 (*y*).

(*y*) *Flinn* v. *Perkins*, 32 Law J., Q. B. 10.

CHAPTER XXI.

OF ACTIONS EX DELICTO, PLEADINGS, DEFENCES, AND EVIDENCE.

SECTION I.—*Pleadings and defences in actions ex delicto.*—Of actions in the county court—Jurisdiction of the county court—Waiver of objection to jurisdiction—Actions in the superior courts—Different forms of action—Joinder of different causes of action—Requisites of the declaration—Statement of special damage—Several counts in declarations—Pleas to the jurisdiction—What matters must be specially pleaded—Pleading several matters of defence—Traverses—Requisites of special pleas—Fictitious and needless averments—Defences arising after the commencement of the action—Payment of money into court—Pleas of infancy, accord and satisfaction, pendency of another action for the same cause, judgment recovered, bankruptcy, statutes of limitations—Equitable defences—Joinder of issue—New assignments—Demurrers.

SECTION II.—*Proceedings and evidence at the trial.*—Right to begin—Effect of payment of money into court—Competency of plaintiffs and defendants to give evidence—When a party may bring forward evidence for the purpose of discrediting his own witness—Primary and secondary evidence—Notice to produce to let in secondary evidence—Proof that the document is under the control of the party receiving the notice—Where notice to produce is unnecessary—When a copy may be received as primary evidence—Facts and circumstances constituting primary evidence notwithstanding the existence of a written memorial thereof—Oral testimony where the law requires a memorandum in writing of the circumstances—Evidence of admissions of liability—Proof of facts resting on hearsay and reputation—Declarations of deceased persons—Entries in books—Statements and declarations forming part of the res gesta—When a party is estopped from contradicting his own representations and from withdrawing a credit given by mistake—Proof by public and private statutes, journals of parliament, royal proclamations, criminal proceedings, records and proceedings of the superior courts, judges' orders, proceedings before magistrates—Proof by sworn or certified copies of books, registers, or original documents, licenses, &c.—Public documents admissible in evidence—Evidence in particular actions—Amendment of variances—Evidence for the defence.

SECTION I.

OF PLEADINGS, DEFENCES, AND EVIDENCE IN ACTIONS EX DELICTO.

Of actions in the county court—Jurisdiction of the county court—Copyright cases.—The proprietor of copyright in any design may institute

proceedings in the county court of the district in which the piracy is alleged to have been committed, for the recovery of the damages he has sustained by reason of such piracy; but in any such proceedings the plaintiff must deliver with his plaint a statement of particulars as to the date and title, or other description of the registration of the copyright, and of the alleged piracy; and the defendant must give notice of any objections to the copyright, or to the title of the proprietor, in manner therein provided (*z*).

Friendly societies.—Applications for the settlement of disputes arising in friendly societies, the rules of which do not prescribe any other mode of settling such disputes, may be made to the county court of the district within which the usual or principal place of business of the society is situate, and the court is to give such relief and make such orders as might be made by the Court of Chancery (*a*). And it has been held that the county court has jurisdiction to reinstate a member of an enrolled friendly society improperly expelled, although the rules of the society prescribe a mode of determining disputes under them (*b*).

General jurisdiction of the county court.—By 9 & 10 Vict. c. 95, s. 60, a summons to answer a plaint in the county court may issue in any district in which the defendant dwells or carries on his business at the time of action brought, or, by leave of the court, in the court for the district in which the cause of action arose (*c*); and it has been held that a railway company neither "carries on its business," nor "dwells," within the district of every county court where it may happen to have a station, but that it must be considered to "carry on its business," and to "dwell," within the meaning of s. 60, at its head quarters, *i.e.* at the place where its principal office is situate, where the directors meet, and where all the affairs of the company are managed and directed (*d*); but a party injured by the wrongful act of the company may sue them in the district where the cause of action arose, by obtaining the leave of the judge of the county court of that district.

By cause of action is meant the whole cause of action; that is, everything which it is necessary for the plaintiff to prove as a condition precedent to his right to recover (*e*).

The statute 9 & 10 Vict. c. 95, s. 58, provides that the county court shall not have cognizance "of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair,

(*z*) As to proceedings in the county court for prevention of piracy, appeal, prohibition, &c., see 21 & 22 Vict. c. 70, ss. 8 & 9.

(*a*) 18 & 19 Vict. c. 63, ss. 41, 42, 44.

(*b*) *Wooldridge, ex parte*, 31 Law J., Q. B. 122.

(*c*) See 19 & 20 Vict. c. 108, s. 15.

(*d*) *Shiels* v. *Gt. North. Rail. Co.*, 30 Law J., Q. B. 331. *Adams* v. *Gt. West. Rail. Co.*, 30 Law J., Exch. 124. *Brown* v. *Lond. & North-West. R. Co.*, 2 N. R., Q. B. 447.

(*e*) *Fuller* v. *Mackey*, 22 Law J., Q. B. 415. *Aris* v. *Orchard*, 6 H. & N. 160; 30 Law J., Exch. 21.

market, or franchise shall be in question (*f*), or in which the validity of any demise, bequest, or limitation, under any will or settlement, may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage." And by 19 & 20 Vict. c. 108, s. 23, it is further enacted, that the county courts shall not have jurisdiction to try any action for criminal conversation; but with respect to all other actions which may be brought in any superior court of common law, if both parties shall agree by memorandum signed by them or their respective attornies, that any county court named in such memorandum shall have power to try such action, such county court shall have jurisdiction to try the same. And (s. 25) that in any action in the county court in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce if both parties at the hearing consent, in writing signed by them or their attornies; but the judgment of the court in such cases is not to be evidence of title between the parties or their privies in any other proceeding; and the consent is not to affect any right of appeal.

The statute 9 & 10 Vict. c. 95, s. 58 (ante, p. 844), does not extend to oust the jurisdiction of the county court in cases where a new remedy has been expressly given in the county court by a subsequent statute. Thus, the Nuisances Removal Act (11 & 12 Vict. c. 123), provides (s. 3), that the amount paid for carrying into force an order of two justices to abate a nuisance may be recovered in the county court from the owner of the premises where the nuisance existed, and a plaint was brought in the county court charging the defendant with certain expenses as being the owner of a ditch, and the defence was that the defendant was not the owner of the ditch, it was held that the title certainly did come in question on this issue, but that the particular statute on which the action was founded gave a special jurisdiction to the county court over the particular question, and gave it express power to try the question of ownership, which necessarily involved the question of title (*g*).

The substance, and not the form of the cause of action, must be regarded in order to determine whether it is one of the excepted actions. If, therefore, a plaint in the county court is in form founded on negligence, but is in substance a plaint for a malicious prosecution, the county court has no jurisdiction to hear and determine it (*h*).

Ouster of jurisdiction of the county court in cases where the title to land

(*f*) *Lawford* v. *Partridge*, 1 H. & N. 621.

(*g*) *Reg.* v. *Harden*, 2 Ell. & Bl. 191; 22 Law J., Q. B. 299.

(*h*) *Hunt* v. *North. Staff. &c. Rail. Co.*, 2 H. & N. 451. *Rogers* v. *Macnamara*, 14 C. B. 27; post, ch. 22.

is in question. — The mere assertion of a *bonâ-fide* claim of title by a party to an action in the county court is not sufficient to oust the jurisdiction of the court. It must be shown that the title to land really "is in question" (*i*); and if it really comes in question, it is immaterial whether it is brought forward "*malâ fide*" or "*bonâ fide*" (*j*). If a plaintiff shapes his case so as to show by his plaint, or the particulars of demand thereunto annexed, that the title to land, &c., comes into question, he then ousts the court of its jurisdiction; but if the plaintiff proceeds for a matter which is *primâ facie* within the jurisdiction of the county court, a mere allegation or notice by the defendant that the title is in question, or a plea setting up title, &c., is not sufficient to oust the jurisdiction of the court (*k*). Proof of the facts stated or pleaded must in the first instance be given, that the judge may inquire into them, and determine whether the title really is in question. But he cannot by his own decision give himself jurisdiction, and if he comes to a wrong judgment, and improperly assumes jurisdiction, a prohibition will lie, and he and his officers will be responsible for their proceedings. The judge must of necessity determine the question of his jurisdiction for himself in the first instance, because on that determination it depends whether he hears the case on the merits (*l*).

It was held that title to a corporeal hereditament came into question in the following cases: where the plaint was for breaking and entering certain apartments of the plaintiff, removing the furniture and expelling the plaintiff, and the plaintiff's case was that he had let the defendant a portion of the cottage, retaining the rest with the furniture for himself; that the defendant broke and entered this (the plaintiff's) part of the cottage, and removed the furniture into a neighbouring shed, affirming that he had taken the whole cottage and would keep it (*m*); where the plaint was for a year's rent of a house let by the plaintiff to the defendant, and the defence was that the plaintiff's title expired subsequently to the letting, and was then vested in another party, who claimed the rent, and it appeared that it was a *bonâ-fide* defence with some evidence to support it, and not a mere illusory matter set up for the mere purpose of ousting the jurisdiction of the court (*n*).

Where an action for false imprisonment was brought against the defendant for giving the plaintiff into custody for trespassing on his close and taking sand therefrom, and a question was raised as to the right to take sand from the close, it was held that this right was not involved in the inquiry into the question of the false imprisonment, as it

(*i*) *Emery, in re*, 2 C. B., N. S. 423; 27 Law J., C. P. 216.

(*j*) *Marsh* v. *Dewes*, 17 Jur. 558.

(*k*) *Lilley* v. *Harvey*, 5 D. & L., P. C. 648.

(*l*) *Thompson* v. *Ingham*, 14 Q. B. 718; 19 Law J., Q. B. 189.

(*m*) *Chew* v. *Holroyd*, 8 Exch. 249; 22 Law J., Exch. 95.

(*n*) *Mountnoy* v. *Collier*, 1 Ell. & Bl. 630; 22 Law J., Q. B. 124.

might have been if the action had been brought for a trespass upon the land, or for a trespass in removing the plaintiff from the land, and the defendant had justified under a plea of *molliter manus imposuit* (*o*).

Recovery of possession of small tenements in the county court.—When the term and interest of any tenant of premises, the rent of which does not exceed 50*l.* a-year, and upon which no fine or premium has been paid, has expired or been determined by notice to quit, and the tenant, or any person claiming under him, neglects or refuses to deliver up possession, the landlord may by plaint, in the county court of the district in which the premises lie, proceed for the recovery of such premises, adding a claim for rent or mesne profits, &c. (*p*). He may proceed also to recover possession by plaint in the county court where he has a right to re-enter for non-payment of rent (*q*). No question of title arises in the case of a landlord proceeding to recover possession of premises demised by him to a tenant, as both the tenant, and all persons claiming under the tenant, are estopped from disputing the landlord's title. If, therefore, the tenant voluntarily lets another person into possession, the person so let in is in the same position as the tenant himself, and is bound by the estoppel (*r*). But the tenant, and those claiming under him, may show that the title which the landlord had at the time of the demise subsequently expired, or was determined; and if such a point comes in question before the county court judge, there is then, as we have seen, a question of title ousting the jurisdiction of the court (*s*). And to give the county court jurisdiction, it must be established that the relationship of landlord and tenant exists between the parties (*t*).

Waiver of objection to jurisdiction—Consensus tollit errorem.—When parties appear before a judge and submit their case to his determination, and make no objection to his jurisdiction until after he has adjudicated, they are often bound by his determination for good or ill because they have assented to it (*u*). Where a judge made an order under the interpleader act which the act gave him no power or authority to make without the consent of the parties, and there was no express formal consent, but both the plaintiff and defendant attended the hearing of the summons before the judge, and took no objection to the making of the order, it was held that they must by their conduct be taken to have submitted the matter to his decision, and that the order was binding and conclusive upon them as an award between them. It was held, also, that as the

(*o*) *Eversfield* v. *Newman*, 4 C. B., N. S. 418.

(*p*) *Harrington* (*Earl*) v. *Ramsay*, 22 Law J., Exch. 326.

(*q*) 19 & 20 Vict. c. 108, ss. 50–56.

(*r*) *Emery, in re*, 4 C. B., N. S. 423.

(*s*) *Mountnoy* v. *Collier*, ante, p. 846.

(*t*) *Banks* v. *Rebbeck*, 20 Law J., Q. B. 476.

(*u*) *Murish* v. *Murray*, 13 M. & W. 56. As to the necessity of making objection to the jurisdiction in certain cases, see ante, pp. 548, 549, 598, 599, 607–613, 616, 620.

order was the order of a superior court, the consent which was necessary to give jurisdiction need not be stated on the face of the order, as it would be intended that the court had jurisdiction (*x*); for nothing shall be intended to be out of the jurisdiction of the superior court but what expressly appears to be so (*y*).

So, where the statute 17 & 18 Vict. c. 125, s. 1, gave jurisdiction to a judge to try issues of fact without a jury, in case the parties consented in writing, and the court or a judge allowed such trial, and the parties to an action verbally consented to try issues of fact before a judge without a jury, and both parties appeared, and the case was heard and decided, it was held that they could not object to his jurisdiction on the ground that there had been no consent in writing, nor any order of the court, or a judge, allowing such trial as required by the act, but that both parties were estopped by their conduct from taking the objection (*z*).

Where a party against whom costs have been given by a court of quarter sessions consents that the taxation shall take place after the sessions are over, and the justices give judgment for costs *nunc pro tunc*, the party so consenting is precluded from afterwards objecting to the want of jurisdiction (*a*).

Of actions in the superior courts — Different forms of action — Joinder of different causes of action in the same suit.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted (s. 3), that it shall not be necessary to mention any form or cause of action in any writ of summons, and (s. 41) that causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; excepting replevin or ejectment, and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court, or a judge, has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and may order separate records to be made up, and separate trials to be had; also (s. 40), that in any action brought by a man and his wife for an injury done to the wife, in respect to which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right.

Requisites of the declaration.—Every declaration of the cause of action must have a certain formal commencement and conclusion, and the name of the county from which the jury are to come to try the action is in all cases to be stated in the margin of the declaration, and taken to be the venue intended by the plaintiff, and no venue is to be stated in the body

(*x*) *Harrison* v. *Wright*, 13 M. & W. 816.

(*y*) *Peacock* v. *Bell*, 1 Wms. Saunds. 74a.

(*z*) *Andrews* v. *Elliott*, 25 Law J., Q. B. 1.

(*a*) *Freeman* v. *Read*, 30 Law J., M. C. 123.

of the declaration, or in any subsequent pleading; but wherever local description is required, such local description is to be given (*b*), and the cause of action must be proved to have arisen at the particular place named: but where local description is not necessary, and the declaration does not allege that the injury was done in any particular locality, it is not necessary to prove the exact place where it was done (*c*).

The plaintiff is at liberty in all personal actions to lay his venue where he pleases, except in certain actions against justices, constables, officers and their assistants (*d*), and the court will not make an order for changing the venue, unless there is manifest inconvenience or impropriety in trying the cause in the county selected by the plaintiff (*e*).

When the declaration is for a breach of duty, the facts creating the duty should be set forth on the face of the declaration. It is not enough to state that it was the duty of the defendant to do the act which he is stated to have neglected to do (*f*). "The decisions," observes Lord Campbell, "show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for if the particular facts set forth raise the duty, the allegation is unnecessary; and if they do not, it will be unavailing. If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated" (*g*). Negligence creates no cause of action unless it expresses or establishes some breach of duty (*h*).

The novelty of the particular complaint set forth in a declaration is no objection to it, provided it shows an injury cognizable by law (*i*).

Statement of special damage.—If any peculiar or special damage has been sustained by the plaintiff, it should be stated in the declaration, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury. Where the action is not maintainable at all without proof of special damage, then the fact of special damage having been sustained cannot be given in evidence without statement of it in the declaration; and in other actions, such as actions for words which are actionable in themselves, particular instances of special damage cannot be given in evidence, unless they are particularised in the declaration (*k*).

It is not necessary in a declaration by a plaintiff, who sues as the ad-

(*b*) 15 & 16 Vict. c. 76, ss. 59, 60. Reg. Gen. 16 Vict., 1 Ell. & Bl. App. lxxix.

(*c*) *Simmons* v. *Lillystone*, 8 Exch. 441; 22 Law J., Exch. 218.

(*d*) Ante, pp. 497, 630. And see Chitty's Arch. Pr., title VENUE.

(*e*) *Helliwell* v. *Hobson*, 3 C. B., N. S. 761.

(*f*) *Brown* v. *Mallett*, 5 C. B. 615. *Metcalfe* v. *Hetherington*, 11 Exch. 269.

(*g*) *Seymour* v. *Maddox*, 16 Q. B. 331.

(*h*) *Dutton* v. *Powles*, 30 Law J., Q. B. 169; 31 ib. Q. B. 191.

(*i*) *Ashby* v. *White*, 1 Smith's L. C. 213.

(*k*) *Browning* v. *Neuman*, 1 Str. 666; ante, p. 716.

ministrator of his deceased wife for his own benefit as husband, to disclose or allege any pecuniary damage suffered by the plaintiff beyond the ordinary claim for damages (*l*).

Several counts in declarations in respect of the same cause of action.— By the rules and orders made by the judges pursuant to the Common Law Procedure Act, 1852, it is provided that, except as thereinafter mentioned, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of the rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as such court or judge may think fit; but the court or judge may allow such counts on the same cause of action as may appear to be proper for the purpose of determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit. And when no rule or order has been made as to costs, and on the trial there is more than one count founded on the same cause of action, and the judge or presiding officer before whom the cause is tried shall, at the trial, certify to that effect on the record, the plaintiff will be liable for all costs occasioned by such count, in respect of which he has failed to establish a distinct cause of action, including those of the evidence as well as those of the pleading (*m*).

Pleas to the jurisdiction of the Queen's courts — Privileges of foreign ambassadors.—The accredited ambassadors of foreign potentates resident in this country are not amenable to the jurisdiction of our civil tribunals. They cannot be lawfully imprisoned in any civil proceeding, nor can their goods be taken in execution; and if a writ is sued out against them, the defendant may defeat the action by pleading to the jurisdiction of the court (*n*). In other cases, to repel the jurisdiction of the king's court, you must show a more proper and more sufficient jurisdiction, for if there is no other mode of trial that alone will give the king's courts a jurisdiction (*o*).

Of pleas in actions ex delicto. — In actions for a wrong or a breach of duty, the plea of Not guilty operates, as we have seen, as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial is admissible under that plea. All other pleas

(*l*) *Chapman* v. *Rothwell*, 27 Law J., Q. B. 315; ante, p. 350.

(*m*) *Mercer* v. *Stanbury*, 25 Law J., Exch. 316; 2 H. & N. 155, n. As to declarations in particular actions, see ante, pp. 54, 56, 122–125, 212, 213, 243, 244, 307, 308, 344, 346, 380, 381, 424, 425, 469–471, 506, 507, 536–538, 580–582, 641, 666, 667, 714, 763.

(*n*) *Magdalena St. Nav. Co.* v. *Martin*, 28 Law J., Q. B. 310.

(*o*) Ld. Mansfield, *Mostyn* v. *Fabrigas*, Cowp. 172.

in denial must take issue on some particular matter of fact alleged in the declaration (*p*). But where an action is brought against a master or employer for injuries sustained through the negligence of his servant or workman in doing his master's work, or executing his orders, the plea of Not guilty puts in issue the fact whether the party doing the injury was the servant of the defendant, and whether he was doing his work or executing his orders (*q*). If several wrongful acts are alleged in the same declaration, the plea of Not guilty puts them all in issue (*r*). Where special damage is substantially the thing complained of, as in actions for verbal slander, where the words spoken are not actionable *per se*, the plea of Not guilty puts in issue the existence of the special damage (*s*).

Not guilty by statute. — The statute 5 & 6 Vict. c. 97, s. 3, which repeals so much of any clause in any act of a local and personal nature whereby parties are entitled to plead the general issue, and give the special matters in evidence, is, by its preamble, confined to actions "for any matter done in pursuance of, or under the authority of, the said acts" (*t*).

What matters must be specially pleaded. — By the new rules of pleading it is provided, that in all actions for torts, all matters in confession and avoidance of the cause of action shall be pleaded specially, as in actions on contract (*u*).

Of pleading several matters of defence. — The defendant may, by leave of the court or a judge, plead, in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit being made by him or his attorney, if required by the court or judge, to the effect that he is advised or believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded are respectively true in substance and in fact. But the pleas of Not guilty, release, statute of limitations, bankruptcy of the defendant, discharge under an insolvent act, coverture, denial that the property, an injury to which is complained of, is the plaintiff's, leave and license, and *son assault demesne*, may be pleaded together as of course, without leave (*x*).

Except in cases specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave

(*p*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxxi.

(*q*) *Mitchell* v. *Crassweller*, 13 C. B. 245.

(*r*) *Card* v. *Card*, 5 C. B. 632.

(*s*) *Wilby* v. *Elston*, ante, p. 717.

(*t*) *Carr* v. *R. Ex. Ass. Co.*, 1 B. & S. 953; 31 Law J., Q. B. 93.

(*u*) Reg. Gen. Hil. Term, 16 Vict., 1 Ell. & Bl. App. lxxxi. As to the plea of Not guilty, and pleading specially in particular actions, see ante, pp. 56, 57, 125, 126, 174, 175, 213, 244–253, 308–310, 346, 347, 381–383, 425, 426, 471–475, 507–513, 538, 582–584, 641, 717, 765.

(*x*) 15 & 16 Vict. c. 76, ss. 81, 84.

of the court or a judge, the opposite party is at liberty to sign judgment; which may, however, be set aside upon an affidavit of merits (*y*).

Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defence, are not to be allowed, unless they appear to the court or judge to be proper for determining the real question in controversy between the parties on its merits, and subject to such terms as to costs and otherwise as the court or judge may think fit. When no rule or order has been made, and on the trial there is more than one plea, replication, or subsequent pleading on the record, founded on the same ground of answer or defence, and the judge or presiding officer, before whom the cause is tried, certifies to that effect on the record, the defendant will be liable for all costs occasioned by such plea or other pleading, in respect of which he has failed to establish a distinct ground of answer or defence, including those of the evidence as well as those of the pleading (*z*).

Traverses by the defendant. — The defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. He is at liberty also to traverse the whole or part of a replication or subsequent pleading of the plaintiff by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations (*a*).

Traverses by the plaintiff. — The plaintiff, on the other hand, is at liberty to traverse the whole of any plea or subsequent pleading of the defendant, by a general denial; or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations (*b*).

By 15 & 16 Vict. c. 65, it is enacted, that special traverses shall not be necessary in any pleading.

Requisites of special pleas. — A plea pleaded generally to the whole declaration must offer a good answer in point of law to all the causes of action comprised therein. If it does not do this it is bad, and the plaintiff is entitled to judgment for so much as is not covered by the plea (*c*). A plea, which is a good plea to some only of the counts of a declaration, should in the introductory part thereof be confined to those counts, and not be pleaded generally to the whole declaration, notwithstanding s. 75 of the Common Law Procedure Act, 1852, which enacts, that pleas capable of being construed distributively shall be taken distributively, for that has reference only to the finding of the jury upon

(*y*) 15 & 16 Vict. c. 76, s. 86. *Messiter* v. *Roe*, 13 C. B. 162.

(*z*) Reg. Gen. 16 Vict., 1 Ell. & Bl. App. lxxix.

(*a*) 15 & 16 Vict. c. 76, ss. 76, 78.

(*b*) 15 & 16 Vict. c. 76, s. 77.

(*c*) *Rogers* v. *Spence*, 12 Cl. & Fin. 718.

the issues joined (*d*). If a plea, which professes to answer the whole of the declaration, is in truth an answer only to part, the plaintiff may be entitled to judgment *non obstante veredicto* (*e*).

In an action of libel, where the declaration sets out several distinct libels in different counts, the defendant cannot plead one plea in justification of the whole, but must plead the truth of the libel to each count separately (*f*).

Any plea, good in substance, is not objectionable (s. 74) on the ground of its treating the declaration either as framed for a breach of contract or for a wrong. No formal defence is required in a plea, or avowry, or cognizance, and it is not necessary to state in a second or other plea, or avowry, or cognizance, that it is pleaded by leave of the court or a judge, or according to the form of the statute, or to that effect (*g*).

Where proof of the precise locality is material to the defence, and the place is not described in the declaration (ante, p. 849), the defendant is bound to show it by his pleading (*h*).

Fictitious and needless averments in pleading. — All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods, or their value; the statement of acts of trespass having been committed with force and arms, and against the peace, &c., and all statements of a like kind, are to be omitted in pleading (*i*).

"It is an elementary rule in pleading, that when a state of facts is relied on it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became a highway; and if the plaintiff's case is that the *locus in quo*, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be a highway at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at the time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. The certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to the informing the court, the jury, and the opponent, of the specific proposition for which he contends; and a scarcely less important object is the bringing the parties to issue on a

(*d*) Jervis, C. J., *Gabriel* v. *Dresser*, 15 C. B. 627. *Wilkinson* v. *Kirby*, 23 Law J., C. P. 224. *Chappell* v. *Davidson*, 2 Jur. N. S. 544. But see *Blagrave* v. *Bristol Wat. Co.*, 1 H. & N. 387.

(*e*) *Lyne* v. *Siesfeld*, 1 H. & N. 281.

(*f*) *Honess* v. *Stubbs*, 8 W. R. 188; ante, pp. 718, 719.

(*g*) 15 & 16 Vict. c. 76, ss. 1, 74, 67.

(*h*) *Webber* v. *Sparkes*, 10 M. & W. 487. *Ellison* v. *Isles*, 11 Ad. & E. 670.

(*i*) 15 & 16 Vict. c. 76, s. 49.

simple and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point" (*k*).

Defences arising after the commencement of the action may be pleaded, together with pleas of defences arising before the commencement of the action, but the plaintiff may confess such plea, and become entitled to the costs of the cause up to the time of pleading such plea. The rule does not apply to the case of a plea pleaded by one or more only out of several defendants (*l*). Any defence arising after the commencement of the action must be pleaded according to the fact, without any formal commencement or conclusion, and any plea which does not state whether the defence therein set up arose before or after action, will be deemed to be a plea of matter arising before action (*m*).

Payment of money into court by way of compensation or amends.— By 15 & 16 Vict. c. 76, it is enacted (s. 70), that it shall be lawful for the defendant in all actions (except actions for assault and battery (*n*), false imprisonment, libel, slander (*o*), malicious arrest or prosecution, criminal conversation, or debauching the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends, and such payment is to be pleaded, as near as may be, in the form given by s. 71 of the statute. The plaintiff may reply to the plea by accepting the sum paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and is at liberty, in that case, to tax his costs, and, in case of non-payment thereof within forty-eight hours, to sign judgment for such costs; or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant is entitled to judgment and his costs of suit (*p*).

Plea of infancy in actions ex delicto.— A plea of infancy constitutes no defence, as we have seen, to an action for an assault or false imprisonment, or to an action of libel and slander, or for seduction; but it is an answer to an action for deceit, and to actions of tort founded on contract, such as an action for a false and fraudulent representation by an infant

(*k*) *Williams* v. *Wilcox*, 8 Ad. & E. 333.

(*l*) Reg. Gen. 16 Vict., 1 Ell. & Bl. App.

(*m*) 15 & 16 Vict. c. 76, s. 68.

(*n*) In trespass for breaking and entering the plaintiff's house, and assaulting his son, whereby the plaintiff lost his son's services, it was held that the defendant might pay money into court. *Newton* v. *Holford*, 6 Q. B. 921. *Aston* v. *Perkes*, 15 M. & W. 385.

(*o*) As to making an apology and paying money into court in cases of libel and slander, see ante, p. 718.

(*p*) As to the effect of a payment of money into court in actions of tort, see post, s. 2.

that he was of full age, whereby the plaintiff was induced to contract with him; for if such an action was maintainable, all the pleas of infancy would be taken away, as such affirmations are in every contract (*q*).

Plea of accord and satisfaction.—Whenever the plaintiff has consented to receive, and has actually received, satisfaction and recompense for the injury he has sustained, the cause of action is discharged, although the satisfaction and recompense were not one-hundredth part of the value of his loss; for, by his own accord and agreement, the injury is dispensed with, and in all actions in which nothing but amends are to be recovered in damages, there a concord carried into execution is a good plea (*r*). The ordinary form of plea of accord and satisfaction is to the effect that, after the accrual of the cause of action, and before the commencement of the suit, the defendant delivered to the plaintiff, and the plaintiff accepted from the defendant, certain goods and chattels, or monies, or securities for money, &c., specifying the nature and character of the things delivered in full satisfaction and discharge of the cause of action, and of all damages sustained therefrom by the defendant. To support this plea it must be proved that the satisfaction was given and accepted in respect of the identical cause of action included in the declaration; for when a plaintiff who had received some internal injury in a railway collision, but was not aware of it, accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person, it was held that such cause of action was untouched by the accord and satisfaction in respect of the injury to the clothes (*s*).

Either money or chattels, railway bonds or negotiable securities, or an estate or interest in land, may be given, granted, or surrendered and accepted by way of compensation and amends for the damages that may have been sustained. If goods of the defendant are in the hands of the plaintiff, and it is agreed between the plaintiff and defendant that the plaintiff shall retain these goods as his own property, in satisfaction and discharge of the cause of action, and the goods are accordingly retained and accepted by the plaintiff in satisfaction, &c., this is a valid accord executed, and is pleadable in bar of an action (*t*). But the delivery and acceptance of a man's own goods and chattels constitute no satisfaction. Thus, in an action of trespass against a defendant in respect of an entry by him upon the plaintiff's land, the defendant said that after the entry there was an accord between them that the plaintiff should re-enter into the same land, and should enjoy it without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title-deeds

(*q*) *Johnson* v. *Pye*, 1 Sid. 258. *Liv. Adel. Loan Ass.* v. *Fairhurst*, 9 Exch. 430.
(*r*) *Andrew* v. *Boughey*, Dyer, 75 b.
(*s*) *Roberts* v. *E. C. Rail. Co.*, 1 F. & F. 460. As to accord and satisfaction for the injury and *all* its consequences *Rideal* v. *Gt. West. Rail. Co.*, ib. 706.
(*t*) *Jones* v. *Sawkins*, 5 C. B. 142.

concerning the said land; that the plaintiff had re-entered, and that the defendant had delivered the title-deeds; and it was held that this was no answer, for it must be intended that the title-deeds were the plaintiff's own title-deeds, and then to deliver him his own deeds, and put him in possession of his own land, was no satisfaction of the wrong done before in keeping him out; but it was admitted, that if the defendant had shown any title in himself to the possession of the deeds, then his delivering them up would have been a good bar to the action (*u*).

The meaning of an accord and satisfaction is, that there has been an agreement for something to be done in satisfaction and discharge of the cause of action, and that the agreement has been completely performed, so that there is a total extinguishment of the original cause of action. The plea, therefore, must set forth an accord executed, showing a complete performance by the defendant of the substituted contract (*x*). Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant, containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless, brought an action, it was held that the accord executed was a bar to the action (*y*).

Plea of the pendency of another action for the same wrong.—"The law abhors multiplicity of actions, and therefore, whenever it appears upon record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate" (*z*). Therefore, in an action of trespass for a horse, it is a good plea in abatement that another action is pending for the same trespass, whether the action be in the same court or in another and different court of co-ordinate jurisdiction (*a*). But the pendency of a suit in an inferior court (*b*), or in a foreign court (*c*), cannot be pleaded to an action in one of the courts of Westminster for the recovery of the same demand; and if an action be brought in the county court, the pendency of an action in the superior court does not oust the jurisdiction of the county court (*d*), and if the two suits are in their nature different, if the proceeding in one is *in rem*, and in the other *in personam*, the pendency of the one cannot be pleaded in suspension of the other (*e*). If a plaintiff sues both at law and in

(*u*) Bro. Abr., ACCORD, 1.
(*x*) *Gabriel* v. *Dresser*, 15 C. B. 622.
(*y*) *Lane* v. *Applegate*, 1 Stark. 97.
(*z*) Bac. Abr., ABATEMENT, M.
(*a*) Lev. Ent. 54. *Spurry's* case, 5 Co. 62a; Com. Dig., ABATEMENT, H. 24.
(*b*) *Laughton* v. *Taylor*, 6 M. & W. 695.
(*c*) *Cox* v. *Mitchell*, 29 Law J., C. P. 33. *Ostell* v. *Lepage*, 16 Jur. 404. *Scott* v. *Ld. Seymour*, 31 Law J., Exch. 457. *Scott* v. *Pilkington*, 31 Law J., Q. B. 81.
(*d*) *M'Murray* v. *Wright*, 11 W. R. 35. *Bissil* v. *Williamson*, 7 Exch. 391; 5 Law T. R., N. S. 321; 10 W. R. 109.
(*e*) *Harmer* v. *Bell*, 7 Moore, P. C. 281.

equity for the same cause of action, he may be compelled to elect in which suit he will proceed (*f*).

The court in many cases will relieve on motion where different actions are brought for the same cause, instead of putting the party to plead. Thus, where compensation in damages has been claimed for a trespass committed by several persons, and full compensation in damages has been received from one of the co-trespassers, the court will interfere summarily to prevent the plaintiff from seeking the same compensation a second time from another co-trespasser; but where the injury done is an injury to character from the publication of a libel, the court will not interfere in a summary way to prevent the continuance of proceedings against the publisher of the libel, on the ground that damages have been recovered by the plaintiff from another publisher of the same libel, as the nature and extent of the injury in each particular case depend upon the extent of the circulation of the libel (*g*).

Plea of judgment recovered.— Whenever judgment has been recovered in an action of tort, the judgment, if pleaded, is a bar to any subsequent action for the same wrong; "for you shall not bring the same cause of action twice to a final determination; *nemo debet bis vexari pro eadem causâ:* and what is the same cause of action is, where the same evidence will support both actions" (*h*). But by allowing judgment to go by default in an action to which there is a good defence, the defendant is not precluded from setting up such defence in any subsequent action in which the matter may arise between the same parties (*i*). In an action for slander, you cannot have an action twice over against the same person for the utterance of the same words on the same occasion, but every fresh utterance and publication of the slander create a fresh cause of action, so that you may have two actions for words spoken at different times, conveying distinct imputations upon the plaintiff; and judgment recovered in the first action would be no bar to the second action. Every plea alleging that the plaintiff brought a prior action against the defendant for the same wrong, and recovered judgment therein (*k*), must contain in the margin thereof a statement of the date of such judgment; and, if such judgment be in a court of record, of the number of the roll, if any, on which the proceedings are entered. In default of such statement, the plaintiff will be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment

(*f*) *Simpson* v. *Sadd*, 24 Law J., C. P. 156.
(*g*) *Martin* v. *Kennedy*, 2 B. & P. 69.
(*h*) *Kitchen* v. *Campbell*, 3 Wils, 304; 2 W. Bl. 827.
(*i*) *Howlett* v. *Tarte*, 31 Law J., C. P. 150.
(*k*) *Basham* v. *Lumley*, 3 C. & P. 489, n.

is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, is at liberty to sign judgment as for want of a plea (*l*).

If the record, when produced, shows on the face of it that the cause of action, in the second suit, is not the same as that for which judgment was recovered in the former action, the record at once disproves the plea, and the plaintiff will be entitled to a verdict (*m*). But the varying of the form of the claim, where the claim is substantially the same, will not be allowed to defeat the operation of the rule. Therefore, where a servant in husbandry, being hired for a quarter of a-year, and having entered the service, was discharged therefrom before the end of the quarter, and then sued her master in the county court for discharging her without reasonable cause, and her master obtained a verdict on the ground that he had good cause for dismissing her, and the servant then, after the quarter had elapsed, took out a summons before justices against her master to recover the quarter's wages, it was held that the question before the justices under this summons was substantially the same as that which had been adjudicated upon by the county court, viz. whether the dismissal was wrongful; that the decision in the county court was conclusive between the parties, and could not be reviewed by the justices. "It was open to the justices," observes Cockburn, C. J., "to inquire whether the county court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful; but as soon as they had ascertained both those facts in the affirmative, they were bound by law to treat the decision of the county court as conclusive between the parties, and not to allow the dispute as to the discharge being wrongful to be reopened" (*n*).

The recovering from a servant of damages for leaving the service of his master, has been held to be a bar to a second action against another party for seducing the servant away from his master's service, because the damage for the loss of service was compensated for in the first action (*o*).

If two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause (*p*); and whenever the cause of action in the two suits is identical, the recovery of judgment in the one is a bar to the other (*q*). A judgment, therefore, in a county court, is a bar to an action on the same subject-matter in any other court (*r*). But a judgment obtained

(*l*) Reg. Gen. Hil. T., 16 Vict. 10; 1 Ell. & Bl. App. 3.

(*m*) *Wadsworth* v. *Bentley*, 23 Law J., Q. B. 3.

(*n*) *Routledge* v. *Hislop*, 29 Law J., M. C. 90.

(*o*) *Bird* v. *Randall*, 3 Burr. 1345.

(*p*) *King* v. *Hoare*, 13 M. & W. 504–506.

(*q*) *Slade's* case, 4 Co. 94 b. *Phillips* v. *Berryman*, 3 Doug. 288.

(*r*) *Austin* v. *Mills*, 9 Exch. 288; 23 Law J., Exch. 42.

upon some technical collateral point, not touching the substantial cause of action between the parties, is no bar to a subsequent action. If the plaintiff makes a mistake in his declaration, and the defendant demurs, and judgment is given for him, the plaintiff may rectify the mistake in a second action (*s*). "Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same" (*t*). "The plaintiff who brings a second action, ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first." Where there are two distinct demands not in the least blended together, and the plaintiff has failed through inadvertence in proving one of them, he may maintain a second action for the other (*u*). Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action (*x*); but when the pleading and the state of the record are such that the plaintiff might, if he had thought fit, have recovered his whole demand in the first action, he cannot afterwards be allowed to recover it in a second action.

Recovery of judgment upon a contract with insurers against loss is, as we have seen, no bar to an action against a wrong-doer who has occasioned the loss, although the insurer has received a full indemnity (*y*).

A plea of the recovery of judgment and damages in an action for a false imprisonment upon a charge of felony, is no answer to an action for a malicious prosecution for the same felony. "It is altogether," observes Parke, B, "a different cause of action. The taking a man upon a charge of felony, is distinct from the act of going before a grand jury and falsely and maliciously taking an oath to get a bill found against him for the same felony, and then going before a petty jury and trying to induce them to find him guilty (*z*).

Where the second action is founded upon some special damage flowing from the original wrong, a plea of judgment recovered in an action for such original wrong, will be a bar to such second action, unless the special damage alleged in the declaration be shown to constitute a new cause of action. Thus, when the plaintiff in his declaration alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action of assault and battery for that and recovered damages, and that since the recovery of such damages, by reason of the same battery, a piece of the plaintiff's skull had come out, and the defend-

(*s*) *Lampen* v. *Kedgewin*, 1 Mod. 207.
(*t*) *Bagot, Ld.* v. *Williams*, 3 B. & C. 239.
(*u*) *Seddon* v. *Tutop*, 6 T. R. 609.
(*x*) *Carter* v. *James*, 13 M. & W. 137. *Howlett* v. *Tarte*, 31 Law J., C. P. 146.
(*y*) *Yates* v. *Whyte*, 4 Bing. N. C. 282; ante, pp. 211, 350.
(*z*) *Guest* v. *Warren*, 9 Exch. 379; 23 Law J., Exch. 121.

ant pleaded in bar the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery (*a*).

Continuing injuries — Judgment recovered. — But where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong does not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and the plaintiff has brought an action and recovered damages for the trespass, he is not thereby precluded from bringing a fresh action and recovering fresh damages for the continuance of the erection. If the defendant, for example, has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible in trespass from day to day until they are removed. Thus, where the trustees of a turnpike road built buttresses on the land of the plaintiff to support the road, and the plaintiff thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held, that after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*b*).

Where an action was brought against the defendant for obstructing an ancient window of the plaintiff's house, by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, and a former judgment recovered by the plaintiff against the defendant for the same grievance was pleaded in bar, and the plaintiff replied that the grievances were not the same, and issue was joined thereupon, and it appeared that on a former trial between the same parties, of an action for an injury to the plaintiff's reversion in the same premises by erecting and keeping up the roof, the plaintiff recovered damages, it was held that such recovery was no bar to the second action; for if the erection of the roof in the first instance was an injury to the reversion, the continuance of it subsequently to the first action was a fresh injury to the reversioner, in respect of which a fresh action was maintainable (*c*).

But where the injury is not of a continuing nature, and the damages which flow therefrom, when they accrue, have accrued once for all, then the recovery of judgment in a previous action is, as we have seen, a

(*a*) *Fetter* v. *Beale*, 1 Salk. 11.
(*b*) *Holmes* v. *Wilson*, 10 Ad. & E. 503.
(*c*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97.

good bar. Thus, if a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's land, and no other action is maintainable (*d*); but where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbour's stream, or of diminishing the supply of water to a neighbour's mill, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighbouring proprietor.

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election; but he can have but one satisfaction for the same wrong, and having sued and recovered judgment against one, he cannot recover against the other (*e*).

Effect of the recovery of judgment in actions for the conversion of property. — We have already seen, that by a recovery of judgment in an action for the conversion of property, the plaintiff's right of property in the things converted is barred, and the property vests in the defendant in the action (*f*). The property in the goods is changed by relation from the time of the conversion. Some of the authorities seem to lay it down that it is not the recovery only, but the recovery coupled with the payment of the damages, that changes the property; but it has been decided that the right of property in the things converted is entirely altered by the judgment, whether the damages are paid or not. "It is the judgment," observes Jervis, C. J., "that disposes of the matter, and not the payment. If, therefore, two persons jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion; or an action for money had and received, to recover the value of the goods for which a judgment has already passed in the former action" (*g*).

Recovery of judgment in rem is no bar to proceeding *in personam*, and, therefore, a judgment *in rem* in the Admiralty Court is not pleadable in bar of an action for damages (*h*).

Plea of the bankruptcy of the plaintiff. — By s. 142 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted, that the bankruptcy of the plaintiff in an action shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings

(*d*) *Clegg* v. *Dearden*, 12 Q. B. 591.

(*e*) *Roswell* v. *Prior*, 2 Salk. 460; 12 Mod. 636. *Brent* v. *Haddon*, Cro. Jac. 555.

(*f*) *Cooper* v. *Shepherd*, 3 C. B. 272; Holroyd, J., 3 B. & C. 206.

(*g*) *Buckland* v. *Johnson*, 15 C. B. 161; 23 Law J., C. P. 204. *Brown* v. *Wootton*, Cro. Jac. 73.

(*h*) *Nelson* v. *Couch*, 2 N. R. 305.

may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy.

Pleas of the Statute of Limitations. — By 21 Jac. 1, c. 16, s. 3, it is enacted, that all actions of trespass, *quare clausum fregit*, all actions of trespass detinue, trover and replevin, for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time and limitation thereafter expressed, and not after; that is to say, the said actions upon the case other than for slander, and the said actions for trespass detinue, and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after. But (s. 4) if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint or writ, the plaintiff, his heirs, executors, &c. may commence a new action within a year after such judgment reversed, or given against the plaintiff, and not after. And by 19 & 20 Vict. c. 97, s. 10, absence beyond seas, or imprisonment at the time of the accrual of the cause of action, is no longer to have the effect of extending the period of limitation (*i*).

Commencement of the period of limitation. — The time of limitation begins to run from the accrual of the cause of action; and when an act has been done which is lawful in itself, but becomes unlawful only in case it causes damage and injury to another, the time of limitation will run not from the period of the doing of the lawful act, but from the time of the accrual of the damage, and the consequent conversion of the act which was lawful in its inception into a tort. Thus, where one person is possessed of the surface of land, and another is owner of the subsoil, and the owner of the subsoil excavates therein for minerals, without causing any immediate apparent injury to the surface, but damage ultimately ensues, and the surface subsides, the time of limitation will begin to run from the time when the damage manifested itself, and not from the period of the

(*i*) *Cornill* v. *Hudson*, 27 Law J., Q. B. 8. As to the limitation of actions by the personal representatives of deceased parties whose death has been occasioned by negligence, see ante, p. 338; also of actions against judges, and officers, and persons acting under statutory authority, see ante, pp. 498–500, 635, 636, 669, 670.

making of the excavation (*k*). Whenever one person does anything or permits anything to be done on his own land which causes injury to his neighbour, and the injury is of a continuing nature, the cause of action, as we have seen, continues, and is renewed *de die in diem* as long as the cause of the continuing damage is allowed to continue. If a man, by digging and constructing basins and canals on his own land, causes a stream of water to flow against his neighbour's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation runs from the time of the falling of the wall, and not from the time of the construction of the basins and canals (*l*). And if a man, by digging on his own land, wrongfully lays open the foundations of his neighbour's wall, and causes them to be gradually weakened by the effect of flowing water, rain, and frost, so that at last the wall falls, the time of limitation runs from the time of the falling of the wall, and not from the time of the excavation of the soil (*m*). And in all cases of continuing nuisances and injuries arising from a continuing wrongful act, there is a continuing cause of action (*n*). Where slanderous words are uttered which create no cause of action unless they are followed by special damage, the period of limitation runs from the time that special damage accrues, and not from the time of the utterance of the words (*o*); but if the special damage accrues long after the words were spoken, or is caused by the repetition of them, the damage would be too remote, and would not create any cause of action at all (ante, pp. 4, 5).

Where an action is brought against a justice of the peace for a false and malicious imprisonment (ante, p. 633), every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the making of the warrant (*p*).

As a general rule, the period of limitation runs from the time of the commission of the wrongful act, and not from the time of the knowledge of that act by the plaintiff, there being no proof of any fraud practised by the defendant in order to conceal that knowledge from the plaintiff (*q*).

In actions for negligence or for a breach of duty, the cause of action accrues at the time of the occurrence of the act of negligence or the breach of duty, and not from the period of its discovery by the plaintiff. If, therefore, an attorney or agent has been guilty of a neglect of duty, and

(*k*) *Bonomi* v. *Backhouse*, 28 Law J., Q. B. 378. 1d. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 Law J., Q. B. 965.

(*l*) *Gillon* v. *Boddington*, R. & M. 161.

(*m*) *Roberts* v. *Read*, 16 East, 217.

(*n*) *Whitehouse* v. *Fell*, 30 Law J., C. P. 305.

(*o*) *Saunders* v. *Edwards*, Sid. 95.

(*p*) *Hardy* v. *Ryle*, 9 B. & C. 608. *Massey* v. *Johnson*, 12 East, 68.

(*q*) *Granger* v. *George*, 7 D. & R. 730 5 B. & C. 149.

the injurious consequences thereof do not come to the knowledge of the principal until after the lapse of six years from the occurrence of the wrongful act, the right of action of the principal is barred (*r*).

Extension of the period of limitation in certain cases.—When the action abates by the death of the plaintiff, or is abated without default of the plaintiff by the act of God, and the period of limitation has run out before the commencement of a fresh action, the courts have indulged the plaintiff with the liberty of suing out a new writ, so that he did it within a reasonably recent period. One mode of measuring the time was with reference to the time it would occupy in getting to the place where a new writ was to be obtained. Hence the writ got the name of a writ of journey's accounts. But there was no exact limit of time to govern the court in saying what was a reasonable time in getting the writ, and the question is, whether the action is, under the particular circumstances of the case, brought within a reasonable period after the expiration of the time of limitation (*s*).

Equitable pleas and defences—By 17 & 18 Vict. c. 125, s. 83, it is enacted, that it shall be lawful for every defendant, or for a plaintiff in replevin in any case in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and these courts are thereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect. Any such matter (s. 84) which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audità querelâ*. The plaintiff may reply (s. 85), in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect. But it is provided (s. 86), that in case it shall appear to the court, or any judge thereof, that any such equitable plea, or equitable replication, cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out (*t*).

Matters which in Chancery would entitle the defendant to an unconditional and perpetual injunction to restrain an action in respect thereof, may, under this statute, be pleaded by way of equitable defence; but if the matters of defence are not such as to entitle the defendant to unconditional relief, they cannot be made the foundation of a good equitable plea (*u*).

(*r*) *Howell* v. *Young*, 5 B. & C. 265.
(*s*) *Curlewis* v. *Mornington*, 27 Law J., Q. B. 430.
(*t*) 17 & 18 Vict. c. 125, ss. 84–87.
(*u*) *Hyde* v. *Graham*, ante, p. 246.

Where the plaintiff complained of three grievances, one relating to the obstruction of his lights, another relating to the taking away of the support of his building, and a third to the obstruction of his chimneys, and causing them to smoke, and the defendant pleaded by way of equitable defence that the whole of the grievances complained of arose from the pulling down of an ancient house and the building of another messuage on the site of it, and that the acts causing the grievances complained of were done with the knowledge, consent, and acquiescence of the plaintiff, and upon the faith of his approval of the mode in which they were done, it was held that the plea disclosed a good equitable defence; but that it was well answered by a replication setting up that the acquiescence and consent upon the faith of which those acts were done were obtained from the plaintiff by the representations of the defendant, that none of the grievances complained of would take place if the plaintiff would give his consent as alleged (*x*).

Joinder of issue.—Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, and such joinder of issue operates as a denial of the substance of the plea or other subsequent pleading and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant (*y*). The object of this new form of replication, "the plaintiff joins issue on each of the pleas," merely enables a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before; but such matters as, before the Common Law Procedure Act, must have been replied specially, must still be so replied; and all matters which must have been pleaded by way of new assignment, must still be so pleaded (*z*).

Pleadings construed distributively.—Pleas of payment and set-off, and all other pleadings capable of being construed distributively, are to be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by a jury, a verdict is to pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered (*a*).

New assignments.—"Where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the

(*x*) *Davies* v. *Marshall*, ante, p. 130. *Rawlins* v. *Wickham*, 3 De G. & J. 304.
(*y*) 15 & 16 Vict. c. 76, ss. 76–79.
(*z*) *Glover* v. *Dixon*, 9 Exch. 159.
(*a*) 15 & 16 Vict. c. 76, s. 75. Reg. Gen. Hil. Term. 16 Vict. No. 62; 1 Ell. & Bl. App. xiii. *Paterson* v. *Harris*, 31 Law J., Q. B. 277.

defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning" (*b*). Where the defendant has committed several trespasses, either upon the person, goods, or lands of another, some of which are justifiable and others not, and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are justifiable, the plaintiff should by his replication make a new assignment, showing the trespasses for which the plaintiff proceeds (*c*). And where the declaration is general, and the subject-matter thereof divisible, and the plea apparently answers the whole cause of action, but in reality answers only a part, the plaintiff must new assign as to the part not really answered. Thus, where the plaintiff complained that the defendant had entered upon the plaintiff's close and cut down one hundred yards of railing, and the defendant pleaded a right of way over the close, and justified the cutting down of the rails, because they obstructed him in the exercise of his right of way, and the plaintiff merely traversed the allegation that the rails were in the highway, and it appeared that some of the rails cut were there, it was held that, upon this issue, both parties must be taken to have agreed that those were the rails in question, and that if the plaintiff meant to go for rails cut down on other parts of his close, he should have so stated by a new assignment (*d*).

The object of a new assignment, therefore, is to correct a mistake occasioned by the generality of the declaration, and is in the nature of a replication to the defendant's plea; or it may be more properly considered as an explanation of the declaration, setting forth the true ground of complaint, as being different from that which is covered by the plea (*e*).

By 15 & 16 Vict. c. 76, ss. 87, 88, it is enacted, that one new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with, and confined by, the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both; and no plea which has already been pleaded to the declaration shall (s. 88) be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a

(*b*) *Monprivatt* v. *Smith*, 2 Campb. 176. As to new assignment, see the note to *Taylor* v. *Cole*, 1 Smith's L. C. 103, 4th edn. Chitty, jun., on Pleading, by Pearson, 767–769. *Lambert* v. *Hodgson*, 1 Bing. 319.

(*c*) See the notes to *Greene* v. *Jones*, 1 Saund. 299. *Robertson* v. *Gantlett*, 16 M. & W. 297.

(*d*) *Bracegirdle* v. *Peacock*, 8 Q. B. 186.

(*e*) Stephens on Pleading, pp. 257–261, 5th edn. *Ellison* v. *Isles*, 11 Ad. & E. 671. *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502.

judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits (*f*).

There can be no new assignment for a cause of action not included in the declaration. A new assignment, therefore, of an entirely new cause of action is bad. The object of it is to inform the defendant that there is another cause of action included in the declaration beyond that which the defendant has answered by his plea, and that the plaintiff means to rely upon the last-named cause of action, and not the cause of action to which the plea is pleaded (*g*). A new assignment admits that the declaration stands well answered by the plea. If, therefore, the plaintiff fails to take issue on the plea, but new assigns a distinct substantive trespass, and fails to prove it, the defendant will be entitled to a verdict. Where in trespass the defendant pleaded that the *locus in quo* was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place, and upon its being admitted in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, the chief justice said that was decisive against the plaintiff, and that the defendant was entitled to a verdict (*h*).

Demurrers.—Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court must proceed and give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, omission, or defect in form; and no pleading is to be deemed insufficient for any defect which, before the passing of the Common Law Procedure Act, 1852, could only be objected to by special demurrer (*i*). A form of demurrer is given in the last-named statute, and in the margin thereof some substantial matter of law intended to be argued is to be stated, and if the demurrer is delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave given to sign judgment as for want of a plea (*k*).

(*f*) As to forms of new assignments see Schedule B. to the Common Law Procedure Act, 1852, Nos. 55, 56, 57.

(*g*) *Rogers* v. *Spence*, 12 Cl. & Fin. 719.

(*h*) Anon. cited 16 East, 86. *Oakley* v. *Davis*, ib. 82. *Atkinson* v. *Matteson*, 2 T. R. 172.

(*i*) 15 & 16 Vict. c. 76, ss. 49–51.

(*k*) Ibid. s. 89.

SECTION II.

PROCEEDINGS AND EVIDENCE AT THE TRIAL.

Right to begin. — The sixteen judges have made a resolution that the plaintiff shall begin at the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant (*l*). And it is now held that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him (*m*).

Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 18, if counsel announces his intention not to adduce evidence, he cannot afterwards do so (*n*).

Effect of payment of money into court. — "Formerly it was supposed by the profession that by payment of money into court in an action of tort the defendant admitted the cause of action sued for, and that as the plaintiff was at liberty to prove any cause of action he pleased, consistent with the declaration, it was the duty of the defendant to take care, by the form of his pleading or by obtaining particulars on summons, that his admission by payment into court was not used to his prejudice; but of late years this rule has been greatly modified, and it has been held that where in an action of tort the declaration is general and unspecific, the payment of money into court, though it admits a cause of action, does not admit the cause of action sued for, and that the plaintiff must give evidence of the cause of action sued for before he can have larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the cause of action sued for, and so stated in the declaration. If the breach is single, and the damages entire, then, of course, it becomes under such circumstances a mere question of damages; but if the damages be compounded of several things, although the payment of money into court may, from the form of declaration, admit the particular cause of action sued for, still it

(*l*) *Carter* v. *Jones*, 6 C. & P. 64; 1 Mood. & Rob. 281.

(*m*) *Mercer* v. *Whall*, 5 Q. B. 458. Taylor on Evidence, pp. 344–347, 3d ed.

(*n*) *Darby* v. *Ouseley*, 1 H. & N. 8.

may be necessary to prove the cause of action, with a view to the damages" (*o*).

Competency of plaintiffs and defendants to give evidence on their own behalf.—By the Amendment of Evidence Acts (14 & 15 Vict. c. 99, s. 2, and 16 & 17 Vict. c. 83), it is enacted, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, and the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or proceeding may be brought, or instituted, or opposed, or defended (*p*), shall, except as thereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. But nothing therein contained shall (s. 3) render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding, or in any proceeding instituted in consequence of adultery. And no husband shall (s. 3) be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (*q*).

When a party may bring forward evidence for the purpose of discrediting his own witness.—By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 22, it is enacted, that a party producing a witness may, in case such witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence; or, by leave of the judge, prove that he has made statements inconsistent with his testimony (*r*). And (s. 23) if a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof

(*o*) Jervis, C. J., *Perren* v. *Monm. Rail. Co.*, 11 C. B. 865.

(*p*) 16 & 17 Vict. c. 83, s. 1.

(*q*) As to evidence of married women in the Divorce Court, see ante, pp. 793, 794.

(*r*) *Jackson* v. *Thomason*, 1 B. & S. 745; 31 Law J., Q. B. 11.

can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

A witness may also (s. 24) be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict him by the writing, his attention must be called to those parts of the writing which are to be used for the purpose of so contradicting him. The judge may, however, require production of the writing for his inspection, and make such use of it as he thinks fit.

A witness may be questioned as to whether he has been convicted, and if he denies the fact, or refuses to answer, the conviction may be proved by certificate and proof of identity, in the manner provided by the statute.

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine is now permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting them, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

Proof of private writings by notice to admit is regulated by the general rules of practice which have been established by the judges (*s*).

It is not now necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite. Such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto (*t*). Deeds above thirty years old prove themselves, so that it is only necessary to produce them, without calling witnesses to prove their execution (*u*), if they appear to come from the proper custody (*v*).

Primary and secondary evidence.—"Our ancestors," observes Best, C. J., "were wise in making it a rule of law that in all cases the best evidence that could be had should be produced; for if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case" (*x*). Therefore, where a sheriff being sued for negligence in not levying under a *fi. fa.*, called the landlord of the premises to prove by word of mouth that a year's rent was due to him, for which he had a right to distrain (ante, p. 562), and it appeared that the rent was reserved by lease, it was held that the oral statement could not be received, as the lease itself was the

(*s*) Reg. Gen. Hil. Term, 4 Wm. 4; 5 B. & Ad. xvii.; 2 Cr. & M. 6; 10 Bing. 456; Chitt. Arch. Pr., NOTICE TO ADMIT.

(*t*) 17 & 18 Vict. c. 125, s. 26.

(*u*) *Rex* v. *Farringdon*, 2 T. R. 471.

(*v*) *Middleton* v. *Gale*, 8 Ad. & E. 155. *Rees* v. *Walters*, 3 M. & W. 527.

(*x*) *Strother* v. *Barr*, 5 Bing. 151. *Fenn* v. *Griffith*, 6 Bing. 533.

best evidence of the fact sought to be established, and ought to be produced for the purpose of proving it (*y*).

A party to the cause is allowed to affect his own rights by parol admissions respecting the contents of written documents if he chooses to answer the questions that may be put to him respecting them (post, p. 879); but where a witness not a party to the cause, and whose answer will affect the rights of others, is asked a question respecting the contents of a written document, the document itself must, in general, be produced, as being the primary and best evidence of what it is, whether the inquiry arise on examination-in-chief, or cross-examination to the facts of the case, or to the credit of the witness, or on re-examination. But a witness may, as we have seen, be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown him (*z*); but if it is intended to contradict him by the writing, his attention must be called to it before it can be used for that purpose (*a*).

If a witness has received a letter, and written an answer to it, he may be questioned as to any statement in the answer respecting the subject-matter of the cause, but he cannot be questioned as to the contents of the original letter (*b*), unless it be proved that the witness has the letter with him in court, or that he has had notice to produce it (*c*), or it can be produced and shown to him. But to exclude oral evidence respecting the contents of a written document, it should appear either that the document itself would be evidence upon the issue if produced, or to contradict the witness if he answered in a particular way, or in which the precise terms and language of the writing itself were necessary to be referred to, in order to answer the question (*d*).

Upon a question collateral to the issue the questioner is, in general, bound by the answer, so that extraneous evidence cannot be gone into to contradict him.

When secondary evidence of written documents is admissible.—Secondary evidence of documents, writings, and transactions, is never admitted until all reasonable and proper means of procuring the primary evidence have been exhausted (*e*); consequently, if a party to a cause wishes to give secondary evidence of the contents of any document or writing which he has received from the adverse party to the suit, or had in his possession, he must account to the satisfaction of the court for its non-production.

(*y*) *Augustien* v. *Challis*, 1 Exch. 279.

(*z*) *De Sailly* v. *Morgan*, 2 Esp. 692. *Crowley* v. *Page*, 7 C. & P. 789.

(*a*) 17 & 18 Vict. c. 125, ss. 24, 103. *Sladden* v. *Serjeant*, 1 F. & F. 323, altering the rule of law on this subject as laid down in the *Queen's* case, 2 B. & B. 286.

(*b*) *Macdonnell* v. *Evans*, 11 C. B. 930, qualified by *Henman* v. *Lester*, 12 C. B., N. S. 776.

(*c*) *Snelgrove* v. *Stevens*, Car. & M. 508. *Dwyer* v. *Collins*, post, p. 873.

(*d*) *Henman* v. *Lester*, 12 C. B., N. S. 789; 31 Law J., C. P. 370.

(*e*) *Rex* v. *Stoke Golding*, 1 B. & Ald. 173. *Boosey* v. *Davidson*, 13 Q. B. 267.

If it has been destroyed, satisfactory proof of its destruction must be adduced. If it has been lost, satisfactory evidence of strict search for it must be forthcoming (*f*). As regards the strictness of the search, there is a great difference, it has been observed, between useful and useless writings. The presumption of law is, that a man will safely keep all valuable and useful papers, but not those which have served their turn, and are not likely to be any longer wanted. Stricter proof of loss, therefore, will be required with regard to papers of the first class than with respect to papers of the second class, in order to let in secondary evidence of their contents (*g*). But you must in all cases give the best evidence of the loss of the original writing that the case admits of. If, therefore, it has been traced to the hands of a third party, and was last seen in his possession, that party must be called to prove that proper search has been made for it (*h*).

Where in an action of trover against a sheriff for a wrongful seizure of fixtures under an execution, it was sought to connect the sheriff with the wrongful act of the officer by proof of the warrant, and no notice to produce the warrant (post, p. 873) had been given, but the warrant was shown to be in the hands of the officer at the time he made the levy, and the officer was called, and stated he had searched for it at different places, and could not find it, secondary evidence was allowed to be given of its contents (*i*). But where a document is proved to have come into the hands of the adverse party to a cause, the opposite party cannot call witnesses to prove that it has been lost or destroyed, with a view to give secondary evidence of it, unless he has previously given notice to produce it (*k*).

Whenever, also, it is sought to render a person responsible for anything that he has written to any other person, or to fix him with any statements or admissions that may have been made by him in writing, and the document is in the hands of a person who is not a party to the cause, the latter should be served with a *subpœna duces tecum*, which is a writ requiring him to appear in court and give evidence in the cause, and bring with him the document in question, which ought to be properly described in the writ, to insure the admission of the secondary evidence in case of its non-production (*l*). If the person in possession of the document is beyond the jurisdiction of the court, it must be shown that all reasonable efforts have been made to insure its production (*m*). When

(*f*) *Kensington* v. *Inglis*, 8 East, 273. *Quilter* v. *Jorss*, 14 C. B., N. S. 747.

(*g*) *Freeman* v. *Arkell*, 2 B. & C. 496; 3 D. & R. 669. *Brewster* v. *Sewell*, 3 B. & Ald. 300. *Rex* v. *Morton*, 4 M. & S. 48.

(*h*) Best, C. J., *Parkins* v. *Cobbet*, 1 C. & P. 282.

(*i*) *Minshall* v. *Lloyd*, 2 M. & W. 458.

(*k*) *Doe* v. *Morris*, 3 Ad. & E. 46; post, p. 873.

(*l*) Chitt. Arch. Pr., *Subpœna duces tecum*.

(*m*) Ibid. NOTICE TO PRODUCE DOCUMENTS. *Boyle* v. *Wiseman*, 10 Exch. 647.

the writing is in the hands of the adverse party in the cause, notice should be given to such adverse party to produce it at the trial (*n*).

Notice to produce a written document to let in secondary evidence of its contents. — Whenever the contents of a written instrument are likely to be required as evidence in a cause, and the writing is in the hands of the opposite party to the action, previous notice should be given to him or his attorney (*o*) to produce it at the trial, and then, if it be proved that the writing has been in his possession, and he fails to produce it when called upon, or to show that it was not in his possession, or under his control, at the time he received the notice, secondary evidence may be given of its contents (*p*). The document should be accurately described in the notice, for if the description is so vague and general as not to give reasonable information to the party who receives it, it will not be available to let in secondary evidence (*q*). A notice, however, to produce "all letters written by the plaintiff to the defendant respecting the matters in dispute in this action," has been held sufficient to let in secondary evidence of a particular letter not otherwise specified (*r*). No general rule has been laid down as to what the notice ought to contain, but enough must be stated in it to leave no doubt that the party must have been aware that the particular document called for would be wanted (*s*). The notice also must be served a sufficient time before the trial to give the party reasonable means of procuring and producing it (*t*). The length of time required to constitute reasonable notice must depend upon the varying circumstances of each case. If the facts show that the document was in the hands of the party at the time he received the notice, and that he could have produced it if so disposed, any notice, however short, would be sufficient (*u*). If it is fair to presume that he would have to send for it, or get it from a distance, a notice giving a reasonable time for that purpose would be requisite. If the document is seen in court at the trial in the hands of the adverse party or his attorney, notice to produce it at once is all the notice that is required, for the object of a notice to produce merely is to enable the party to bring the document to court if he likes; and, if he does not, to enable his opponent to exclude the objection, that he has not taken all reasonable means to procure it (*x*).

Proof that the document has been in the possession of the adverse party receiving the notice. — Before a notice to produce any particular document

(*n*) Chitt. Arch. Pr., NOTICE TO PRODUCE.

(*o*) *Cates* v. *Winter*, 3 T. R. 306.

(*p*) *Att.-Gen.* v. *Le Marchant*, 2 T. R. 201, n.

(*q*) *Jones* v. *Edwards*, M'Clel. & Y. 139. *France* v. *Lucy*, R. & M. 341.

(*r*) *Jacob* v. *Lee*, 2 Mood. & Rob. 33. *Morris* v. *Hauser*, ib. 392.

(*s*) *Rogers* v. *Custance*, 2 Mood. & Rob. 181.

(*t*) *Lawrence* v. *Clark*, 14 M. & W. 253. *Gibbons* v. *Powell*, 9 C. & P. 634. *Leaf* v. *Butt*, Car. & M. 451.

(*u*) *Suelgrove* v. *Stevens*, Car. & M. 508.

(*x*) *Dwyer* v. *Collins*, 7 Exch. 639, overruling *Doe* v. *Gray*, 1 Stark. 283.

can be made available to let in secondary evidence of its contents, the document must be traced to the possession of the person receiving the notice (*y*), or to the possession of his servant or agent (*z*). Proof that a letter, properly addressed to the adverse party to a suit, has been put into the post-office, or placed in the ordinary course of transmission by post (*a*), or has been delivered at the residence of such party, or placed in the hands of his servant or agent, is sufficient to raise a reasonable presumption that the letter has come into his possession; and if it is once traced to his possession, it is for him to show that it was not in his hands or under his control, and that he had no means of obtaining it at the time he received the notice to produce it (*b*). If the instrument is in his possession at the time of the service of the notice, he cannot afterwards, by voluntarily parting with it, do away with the effect of the notice (*c*); and a document is always presumed to be in the possession, or under the control, of a party when it is in the hands of his servant, or agent, or bailee, or some person bound by law to give it up to him on his demand (*d*), but not if it is in the hands of a wholly independent party (*e*).

Where a letter which had been in the possession of the defendant was filed in the Court of Chancery, pursuant to an order of that court, it was held that the plaintiff was not entitled to give secondary evidence of the contents of the letter, on the ground that it was as much within the possession of one party as of the other, for either party might, on application to the Court of Chancery, have obtained permission to produce it (*f*); but where an order had been made by the court for the delivery of the document to the defendant or his attorney, so that he could have got it by applying for it, and he failed to procure it and produce it after notice, it was held that he had "opened the door to secondary evidence" (*g*).

Where notice to produce is unnecessary.—"Although," observes Holroyd, J., "it be a general rule of law that the best evidence is to be produced, yet that rule is not to be taken literally, for, with respect to evidence of a person holding an office, such as constable, or holding any official character or appointment, it is not necessary to produce the actual appointment, though it be made under seal. It is sufficient to show that the party is actually in the exercise of his office or public employment, and constantly discharging the official or public duties thereof" (*h*).

(*y*) *Sharpe* v. *Lamb*, 11 Ad. & E. 805.
(*z*) *Sinclair* v. *Stevenson*, 1 C. & P. 582. *Bell* v. *Francis*, 9 ib. 66.
(*a*) *Skilbeck* v. *Garbett*, 7 Q. B. 846.
(*b*) *Harvey* v. *Mitchell*, 2 Mood. & Rob. 366.
(*c*) *Knight* v. *Martin*, Gow. 104.
(*d*) *Taplin* v. *Atty*, 3 Bing. 166. *Baldney* v. *Ritchie*, 1 Stark. 338. *Partridge* v. *Coates*, R. & M. 156. *Parry* v. *May*, 1 Mood. & Rob. 279.
(*e*) *Whitford* v. *Tutin*, 4 M. & Sc. 166.
(*f*) *Williams* v. *Munnings*, Ry. & Mood. 19.
(*g*) *Rush* v. *Peacock*, 2 Mood. & Rob. 162.
(*h*) *Brewster* v. *Sewall*, 3 B. & Ald. 302. *Dexter* v. *Hayes*, 11 Ir. C. L. R. 106, Exch. *Chapell* v. *Bray*, 6 H. & N. 145.

Evidence, also, of persons being trustees or commissioners of turnpikes and excise officers, may be given by proof of their having acted as such, without proof of their appointment (*i*). Various instances may be mentioned where notice to produce a writing is unnecessary in order to let in secondary evidence of its contents. This is the case where the instrument produced and that to be proved are duplicate originals (*k*); where the instrument to be proved is a notice, such as a notice to quit, or a notice of the dishonour of a bill of exchange (*l*); where, from the nature of the action, the opposite party must know that he is charged with the possession of the document, as where the action is brought for recovering possession of the instrument itself (*m*).

There are no degrees of secondary evidence. Where, therefore, a party is entitled to give secondary evidence at all, he may give any secondary evidence within his power (*n*).

When copies of documents may be received as primary evidence. — The adverse party to a suit may have so treated and dealt with a copy of an original document, as to have admitted the truth of the contents of the copy, and rendered it receivable as primary evidence against him by way of an admission. Thus, where a lord of a manor kept a document in his possession which he represented to be a true account of the customs of the manor, it was held to be no objection to the reception of the document, as evidence against the lord, that it purported to be a copy of a decree of the Court of Chancery (*o*).

Facts and circumstances constituting primary evidence, notwithstanding the existence of a written memorial thereof. — "The fact of a conversation or transaction being reduced into writing, furnishes no general principle for excluding oral evidence of the conversation or transaction. Such evidence is by no means necessarily secondary to the writing. Judges take notes of the evidence given on trials, yet the evidence may be proved from recollection, even on an indictment for perjury (*p*). The exclusion must be founded either on the agreement of the parties or on the requirements of some particular law. When parties, by common consent, reduce into writing the terms of a contract or agreement, then, as between themselves, such writing must be produced, and cannot be contradicted or even

(*i*) 3 Geo. 4, c. 126, s. 134; 7 & 8 Geo. 4, c. 53, s. 17.

(*k*) A duplicate of a letter taken by means of a copying machine is only a copy, and must be treated as such, *Nodin* v. *Murray*, 3 Campb. 227; but when a number of printed copies are struck off from one common impression they are duplicate originals, and primary evidence of each other's contents, *Rex* v. *Watson*, 2 Stark. 130.

(*l*) *Colling* v. *Treweek*, 6 B. & C. 398. *Swain* v. *Lewis*, 2 Cr. M. R. 261. *Doe* v. *Somerton*, 7 Q. B. 58. *Dwyer* v. *Collins*, 7 Exch. 645.

(*m*) *How* v. *Hall*, 14 East. 274. *Scott* v. *Jones*, 4 Taunt. 864. *Whitehead* v. *Scott*, 1 Mood. & Rob. 2. *Jolley* v. *Taylor*, 1 Campb. 143.

(*n*) *Doe* v. *Ross*, 7 M. & W. 107.

(*o*) *Price* v. *Woodhouse*, 3 Exch. 616.

(*p*) *Rowley's* case, Moody's C. C. R. 111.

added to by oral evidence; for it is a reasonable presumption that, though other things were said or done besides those recorded in the writing, the parties concurred in treating those other things as not essential parts of the contract. But this reasoning does not apply to third parties. There may well be occasions, either civil or criminal, in which others may have an interest in proving what really passed, and there is no reason why they should not be permitted to prove it from the memory of witnesses without producing the writing" (*q*).

Oral testimony in cases where the law requires a memorandum in writing of the circumstances. — "Where matters are required to be reduced into writing by statute, either for the purpose of giving validity to the transaction, or for the purpose of evidence, the writing may be considered the primary evidence, and must be produced. But questions may arise as to the extent to which other evidence is to be excluded, in the determination of which the necessity of the case in some instances, the purposes of the enactment in others, must be looked to. Various statutes require the examinations of witnesses and prisoners to be reduced into writing (ante, pp. 601, 603); but on the trial oral evidence is admissible by way of explanation, or to prove that the party made other statements besides those recorded in writing, otherwise the safety of prisoners and the credit of witnesses would depend on the honesty and accuracy of the clerks who take the examination" (*r*). It has been held that oral evidence is admissible to add to the examination of a party before a magistrate, though the examination was taken down in writing; and that anything the party may have said as part of his information, beyond what was put into writing, may be proved (*s*). But the writing must be produced to see what it contains before questions can be asked respecting matters which it does not contain.

Where an examination of a prisoner made by a coroner was inadmissible on account of an irregularity in the mode of taking it, the coroner was allowed to state what the prisoner said on the occasion of his examination (*t*), for "what a party says is evidence against himself whether another person took it down or not" (*u*). Where on a preliminary hearing of a case the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it, it was held that what the witness said might be proved by any one who heard him, without producing the clerk's note (*x*).

The fact of marriage may, except in certain criminal cases, and cases

(*q*) *Jeans* v. *Wheedon*, 2 Mood. & Rob. 487, n.

(*r*) 2 Mood. & Rob. 487, n.

(*s*) *Venafra* v. *Johnson*, 1 Mood. & Rob. 316. *Rowland* v. *Ashby*, R. & M. 231. *Harris's* case, Mood. C. C. R. 338.

(*t*) *Rex* v. *Reed*, 1 Mood. & Malk. 403.

(*u*) Alderson, B., *Robinson* v. *Vaughton*, 8 C. & P. 255.

(*x*) *Jeans* v. *Wheedon*, 2 Mood. & Rob. 486.

of adultery, be proved by oral evidence of eye-witnesses of the ceremony, or by oral evidence of general reputation, or of the parties having lived together as man and wife, though the law requires a memorandum of the event to be kept in a public register, which is not produced, nor any office copy or attested extract (*y*). The fact of birth or baptism, death or burial, may in like manner be proved by oral testimony, though the law requires these events to be recorded in public registers. Inscriptions, also, on flags and banners, writings on walls, notices painted on boards and poles fastened into the ground, and the contents of a resolution read at a public meeting, may be proved by oral testimony, without producing or giving notice to produce the flags, the walls, the boards, or the resolution (*z*). But portable notices not affixed to the freehold must be produced where they are relied upon, as forming the basis of some contract or arrangement between the parties (*a*).

The distinction between primary and secondary evidence does not apply to evidence of acts actually done in the presence of eye-witnesses of the fact. Such acts may be proved by oral testimony, although there may be a record in writing of the things done. Acts done at a public meeting are provable by oral testimony, though the proceedings are put into writing, and read aloud from the chair. If a man reads a treasonable paper, the oral evidence of a bystander is admissible to prove what was read aloud, without producing or giving notice to produce the paper. The reduction of a speech or a resolution, therefore, into writing, does not prevent oral evidence of the speech and resolution from being given; and if the writing is produced it may be contradicted, and it may be shown by the oral testimony of the parties present not to be the writing that was read.

On an indictment for administering an unlawful oath, a bystander, who heard the words of the oath read out from a written paper, may prove the substance and object of the oath from general recollection of what was said, although no notice has been given to produce the paper (*b*).

If in an action for slanderous words it be proved that some person took down the words, that will not prevent another witness from giving parol evidence of what the words were (*c*). If a party makes a memorandum of particular facts and circumstances at the time they occur, and has not his paper with him, he may, nevertheless, give oral evidence of the facts, if he has a distinct recollection of them, independently of the

(*y*) *St. Devereux* v. *Much*, 1 W. Bl. 367. *Morris* v. *Miller*, 1 W. Bl. 632.

(*z*) *R.* v. *Hunt*, 3 B. & Ald. 566. *Bartholomew* v. *Stephens*, 8 C. & P. 728. *Mortimer* v. *M'Callan*, 6 M. & W. 68. *Sayer* v. *Glossop*, 2 Exch. 411. *Shrewsbury Peerage*, 7 H. L. C. 1. *Bruce* v. *Nicolopulo*, 11 Exch. 133.

(*a*) *Jones* v. *Tarleton*, 9 M. & W. 675.

(*b*) *Rex* v. *Moors*, 6 East, 421, n.

(*c*) *Sheridan's* case, 31 How. St. Tr. 673.

writing (*d*); but the non-production of the writing is, of course, matter of comment and observation.

The mere fact of the payment of a sum of money, or of the amount of a particular bill, may be proved by oral testimony, although a receipt in writing may have been given for the money, or the amount paid may have been entered in a ledger or memorandum-book (*e*).

Where in an action of trover it appeared that two demands of goods had been made, one verbally and the other in writing, it was held that the verbal demand might be proved without production of the demand in writing. "I may," observes Lord Ellenborough, "make a demand in words and a demand in writing, and, both being perfect, either may be proved. If the verbal demand has any reference to the writing, the writing must be produced, but if they were concurrent and independent, I do not see how adding the latter could supersede the former, or vary the mode of proving it" (*f*).

If at the trial a party produces what he alleges to be a copy of a document, and the opposite party then produces a document which he alleges to be the original, the judge must determine whether it is the original, for if it is, the copy is inadmissible (*g*).

Evidence of admissions of liability, although they relate to the contents of a deed or writing.—The defendant's own declarations have been held to be admissible in evidence against him, although they relate to the contents of a written instrument not produced. "The authority of Lord Tenterden at *nisi prius*, in the case of *Bloxam* v. *Elsee*" (*h*), observes Parke, B., "is no doubt to the contrary; but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. The reason why such parol statements are admissible without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, when the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question" (*i*).

The mere relationship of landlord and tenant between particular parties may be established by their own admissions, by words and conduct,

(*d*) *Thistlewood's* case, 33 ib. 758.
(*e*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*f*) *Smith* v. *Young*, 1 Campb. 439.
(*g*) *Boyle* v. *Wiseman*, 11 Exch. 367.
(*h*) R. & M. 187; 1 C. & P. 558.
(*i*) *Slatterie* v. *Pooley*, 6 M. & W. 669. *Newhall* v. *Holt*, ib. 664. *Earle* v. *Picken*, 5 C. & P. 542. *King* v. *Cole*, 2 Exch. 632.

although the tenancy may have been created, and may be regulated by a lease in writing. And the declaration of a tenant of the terms upon which he holds his lands, the amount of his rent, and the time it becomes payable, is admissible in evidence against him, although the terms are embodied in a lease or written agreement, under which he holds (*k*).

But whenever you mean to give evidence of the statement or declaration of a party for any purpose, you should first call the person himself, and ascertain from him whether he ever used the expressions or made the statement you wish to prove (*l*); and if the question put to him has reference to statements and declarations recorded in writing, he cannot be compelled to make admissions against himself without the production of the writing (*m*).

A defendant stands in the position of an ordinary witness when it is sought to cross-examine him as to the contents of a record or writing to which he is a party, and he cannot be compelled to give evidence of the contents of the instrument unless it is produced, or he has had notice to produce it; but if he chooses to make admissions respecting it, such admissions will be evidence against him. Thus, where the plaintiff's counsel proposed to ask the defendant, being a witness under cross-examination, whether an action had not been been brought against him in the county court, what was the subject of that action, and what its result, and the defendant's counsel objected to the question on the ground that it related to the contents of a judicial proceeding, the record of which would be the primary and best evidence, it was held that as the defendant was a party to the proceeding, what he said as to the result of it, and the verdict of the jury, would be evidence against him, whether it related to a record or writing or not, and that the question therefore might be put, but that he had the option of answering or not as he pleased (*n*).

Proof of facts resting on hearsay and reputation.—Hearsay evidence, or evidence not founded upon the personal knowledge of the witness, but upon what he has heard another person, not a party to the suit, say respecting some particular fact is, if that other person be living, inadmissible in our courts of justice, because the primary and best evidence is the statement of the person from whom the information is derived, which ought to be given on oath in open court, in the presence of the parties or their counsel, so that there may be an opportunity of cross-examination, and testing the value of the evidence in the presence of those who are to decide upon it. But the declarations and statements of deceased persons, respecting facts and circumstances which may be presumed to have been within their knowledge, are receivable in evidence in certain cases, in

(*k*) *Howard* v. *Smith*, 3 M. & Gr. 257; ante, p. 478.

(*l*) *Carpenter* v. *Wall*, 11 Ad. & E. 805.

(*m*) *Darby* v. *Ouseley*, 1 H. & N. 6; ante, pp. 870, 871.

(*n*) *Henman* v. *Lester*, ante, p. 871.

proof of matters of common reputation or notoriety, and of local and personal, or family interest. But, in these cases, those very persons who are permitted to give evidence of what they may have heard from dead persons respecting the reputation of the right, are not permitted to state facts of the exercise of the right which the deceased persons said they had seen (*o*).

In most countries, besides our own, judges determine upon the facts in dispute as well as upon the law, and they think there is no danger in listening to evidence of hearsay, because in considering their judgment upon the merits, they can trust themselves entirely to disregard it, or to give it no more weight than it deserves. But in this country, where the jury are the sole judges of the facts, hearsay evidence is excluded, because no man can tell what effect it might have upon their minds (*p*).

In cases of pedigree, declarations of deceased members of a family, monumental inscriptions, entries in family bibles, and pedigrees hung up for many years in the family mansion, have been admitted in evidence to establish particular facts of family interest, such as marriages, births, deaths, and the like (*q*), it being generally impossible to prove these facts by living witnesses, and such events being matters of notoriety talked about in the neighbourhood, and among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, or recorded in family writings, may be presumed to be true. But after a dispute has arisen respecting the subject-matter of such evidence, the presumption in favour of the evidence fails, and it is then excluded (*r*). In these cases the evidence must be derived from relatives in blood, or from the husband with respect to his wife's relations, or from the wife with respect to her husband's family. If it proceeds from servants or friends it is inadmissible (*s*).

In cases of general rights depending upon immemorial usage (ante, pp. 91, 183–189), living witnesses can only speak of their own knowledge to what has passed in their own time; and, therefore, to supply the necessary evidence, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right. A declaration with regard to a particular fact which would support or negative the right is inadmissible (*t*). The evidence, also, is admissible only to prove

(*o*) Grose, J., *The King* v. *Eriswell*, 3 T. R. 7.

(*p*) Mansfield, C. J., *Berkeley Peerage*, 4 Campb. 415.

(*q*) Mansfield, C. J., *Goodright* v. *Moss*, Cowp. 594. *Slaney* v. *Wade*, 7 Sim. 595.

(*r*) Mansfield, C. J., *Berkeley Peerage*, 4 Campb. 415. *Rex* v. *Cotton*, 3 Campb. 446. *Shedden* v. *Patrick*, 30 Law J., Prob. & Matr. 217. *Gee* v. *Ward*, 7 Ell. & Bl. 509.

(*s*) *Johnson* v. *Lawson*, 9 Moo. 183; 2 Bing. 86. *Shrewsbury Peerage*, 7 H. L. C. 1.

(*t*) Mansfield, C. J., *Berkeley Peerage*, 4 Campb. 415. *Reg.* v. *Bedfordshire*, 4 Ell. & Bl. 542.

a public right, in which all the Queen's subjects are interested. If the right is a mere private prescriptive right it is inadmissible (*u*). When all the inhabitants of a manor, or all the tenants of it, or of a particular district of it, are interested (ante, p. 83), the right is of a public nature, and may be supported by hearsay evidence of reputation (*x*); but where a certain number only of the tenants of a manor claim separate prescriptive rights over the lord's waste (ante, pp. 85, 88), depending on each separate prescription, these rights are not of a public character, although there be many of them, and they cannot consequently be supported by hearsay evidence of reputation (*y*). Traditionary reputation is evidence of boundary between two parishes or manors (*z*), but not of the boundary between two estates (*a*).

When the statements and declarations of deceased persons are sought to be given in evidence respecting matters of local interest, it should be shown that such deceased persons were conversant with the locality (*b*). When the right claimed is of a more general nature, such as a right of highway, or of ferry, in which all persons are interested, evidence of what any deceased person has been heard to say respecting the right is receivable, but it would be almost worthless unless it comes from some one having good means of knowledge (*c*).

Declarations of deceased persons against proprietary or pecuniary interest made by such persons in their lifetime, are admissible in evidence after their death, not only to establish a particular fact against interest, but also any other fact substantially connected therewith, embodied in the declaration. Thus the statements and declarations of a person in the possession or occupation of a tenement, as to the terms of his holding, the amount of his rent, the time that it became due, the duration of his tenancy, and the name of his landlord, are admissible in evidence after his decease, as between strangers, to establish any one or more of these facts, the declaration or statement being considered to be against the proprietary interest of the party making them, as cutting down his estate and interest in his tenement, and subjecting him to divers pecuniary obligations and burthens; and the admissibility of the evidence is the same, whether the statement is in writing or is merely verbal, though the value of the evidence may be greater in the one case than in the other (*d*).

Entries of deceased persons against interest made by such persons in books, papers, accounts, or writings, are also admissible in evidence, not

(*u*) *Pipe* v. *Fulcher*, 1 Ell. & Ell. 117.
(*x*) *Carnarvon (Earl)* v. *Villebois*, 13 M. & W. 332; 14 Law J., Exch. 233.
(*y*) *Dunraven (Lord)* v. *Llewellyn*, 15 Q. B. 809.
(*z*) *Nicholls* v. *Parker*, 14 East, 331, n.
(*a*) *Clothier* v. *Chapman*, ib.
(*b*) *Weeks* v. *Sparke*, 1 M. & S. 689. *Rogers* v. *Wood*, 2 B. & Ad. 245.
(*c*) Parke, B., *Crease* v. *Barrett*, 1 Cr. M. & R. 931. *Pim* v. *Curell*, 6 M. & W. 234.
(*d*) *Reg.* v. *Birmingham*, 1 B. & S. 763; 31 Law J., M. C. 63. *Peaceable* v. *Watson*, 4 Taunt. 15.

only to prove a particular fact against the interest of the party making the entry, but also any collateral circumstances connected with the entry against interest. Thus the entries in the books of a deceased man-midwife, attending upon a woman at the time of her delivery, and making charges for his attendance, against which was marked the word "paid," were admitted as evidence of the time of the birth of a child as noted in those entries (*e*); for by the entry "paid," the party making it repelled a claim which he would otherwise have had upon another for work performed and medicines furnished, and the entry, therefore, was an entry against his interest. Upon the same principle entries of charges in the books of a deceased attorney marked as "paid," have been received in evidence to prove the date of the transactions to which they referred (*f*); also the private books of a deceased steward, or a collector of taxes, wherein he acknowledged the receipt of sums of money in his character of steward or collector (*g*), although the entries were not proved to be in his handwriting (*h*).

The exception in favour of admissions of this sort manifestly does not extend to entries made in discharge of the parties making them. Entries, therefore, in a deceased steward's book, made in his favour, and not connected with other entries made against him, are not evidence of the facts mentioned in such entries (*i*); but where there are entries in an account-book charging and discharging the person making them, both sides of the account may be looked at; and it is no objection to the reception of an account containing items of charge and discharge, that the balance appears to be in favour of the deceased person making the entries, as "a man is not likely to charge himself for the purpose of getting a discharge" (*k*). An entry showing that the deceased party has taken upon himself some contingent liability, such as a memorandum of a contract to be performed in future, is not such an entry against interest as comes within the exception (*l*).

Where the entry is admitted in evidence as being against the interest of the party making it, it carries with it the whole statement; but if the entry is merely an act done in the course of a man's duty, then it is confined to matters within that duty (*m*).

It has been held that it is not necessary that the deceased person should have his own knowledge in all cases of the fact represented or

(*e*) *Higham* v. *Ridgway*, 10 East, 116. Bayley, J., *Gleadow* v. *Atkin*, 1 Cr. & M. 423.

(*f*) *Doe* v. *Robson*, 15 East, 34.

(*g*) *Barry* v. *Bebbington*, 4 T. R. 514. *Middleton* v. *Melton*, 10 B. & C. 317. *Warren* v. *Grenville*, 2 Str. 1129. *Crease* v. *Barrett*, Cr. M. & R. 919. *Marks* v. *Lahee*, 3 Bing. N. C. 419.

(*h*) *Doe* v. *Stacey*, 6 C. & P. 139.

(*i*) *Knight* v. *Waterford* (*Marquis*), 4 Y. & C. 284.

(*k*) Maule, J., *Doe* v. *Beviss*, 7 C. B. 509. *Buller* v. *Michel*, 2 Pr. 399. *Rowe* v. *Brenton*, 1 M. & R. 268.

(*l*) *Reg.* v. *Worth*, 4 Q. B. 140.

(*m*) *Percival* v. *Nanson*, 7 Exch. 3. *Stead* v. *Heaton*, 4 T. R. 670; post, p. 883.

stated. If the entry charges him so as to be against interest, it becomes admissible against all persons. But the absence of personal knowledge will materially affect the weight of the evidence when received (*n*).

Entries of deceased persons in books made in the exercise of the duties of their office or employment are admissible as evidence of the facts stated or represented by such entries (*o*), unless it appears that such parties or their employers were not wholly disinterested in the matter, or that the entry was not made cotemporaneously with the transaction to which it relates (*p*), or that it was made after the dispute or litigation about the matter had commenced. An entry of this sort is evidence only of facts which it was the duty of the writer, in the exercise of his office or employment, to record, and not of collateral facts and circumstances incidentally referred to in his statement (*q*). Proof of the character filled by the writer, and of the entry having been made in the discharge of the duty of his office or employment, is a necessary preliminary to the admissibility of the evidence (*r*). Where the entries have not been written by the party himself, but by some other deceased person at his dictation, they are not admissible in evidence (*s*).

When the book in which the entry is found is an ancient book, and comes from the proper custody, it is not necessary to prove the handwriting of the party who made the entry (*t*).

Statements and declarations accompanying an act are admissible in evidence as part of the *res gesta* to show the real nature and character of the transaction. Thus, the cries of a mob during a riot are admissible in evidence to show the object and intentions of the rioters, and so are the cries and exclamations of a person uttered at the time of an alleged assault (*u*), and the complaints and statements of persons found injured as to the cause of the injury (*x*). When the conduct of any person, or the character of his acts at a particular period, is in question, the exclamations of bystanders, made at the time they witnessed what he did, are admissible in evidence to throw light on the matter in issue, and advance the pursuit after truth. A letter written by the plaintiff himself on the day a certain transaction took place, making certain inquiries and directing certain things to be done, which were done in obedience to the letter, has been held admissible in evidence on the part of the plaintiff himself in

(*n*) *Crease* v. *Barrett*, 1 Cr. M. & R. 925.

(*o*) *Doe* v. *Turford*, 3 B. & Ad. 890. *Poole* v. *Dicas*, 1 Bing. N. C. 652. *Pritt* v. *Fairclough*, 3 Campb. 315. As to shop-books, see *Price* v. *Torrington* (*Earl of*), 1 Salk. 285. *Symonds* v. *Gas, &c. Co.*, 11 Beav. 283. *Ellis* v. *Cowie*, 2 C. & K. 719.

(*p*) Parke, B., *Doe* v. *Skinner*, 3 Exch. 88. *Rawlins* v. *Rickards*, 28 Beav. 370.

(*q*) *Chambers* v. *Bernasconi*, 1 Cr. M. & R. 367. *Percival* v. *Nanson*, ante, p. 882.

(*r*) *Short* v. *Lee*, 2 Jac. & W. 467.

(*s*) *Brain* v. *Preece*, 11 M. & W. 775. *Cooper* v. *Marsden*, 1 Esp. 2.

(*t*) *Wynne* v. *Tyrwhit*, 4 B. & Ald. 376.

(*u*) *Thompson* v. *Trevanion*, Skin. 402. Best on Evidence, p. 611. Taylor, vol. i. pp. 480–497.

(*x*) *Aveson* v. *Ld. Kinnaird*, 6 East. 194.

support of his own case, to show the nature and character of the transaction in which he was engaged (*y*).

Where a dressing-case, the property of the defendant's sister-in-law, had been stolen from the defendant's house, and suspicion fell on the plaintiff, and a policeman was sent for, who, on hearing the facts stated by the sister-in-law in the presence of the plaintiff, said, "Do you give her (the plaintiff) into custody?" and the sister-in-law replied, "I will go, and ask my brother-in-law" (the defendant), and went out and then returned, it was held that what she said when she came back was admissible in evidence against the defendant as part of the *res gesta* (*z*).

When the adverse party in a suit is estopped from giving evidence to contradict his own statements and representations to the plaintiff. — Where one person by his words or conduct wilfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*a*); for a man shall not be allowed to blow hot and cold, to affirm at one time and deny at another, making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion (*b*). "By the term 'wilfully,'" observes Parke, B., "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth" (*c*).

Where an action was brought for the conversion of a policy of insurance, and the plaintiff proved that he had given instructions to the defendant to effect a policy for him, and gave in evidence a letter from the defendant to the plaintiff stating that he had effected the policy, Lord Mansfield refused to allow the defendant to contradict his own representation, and show that no policy had been effected, and held him liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected (*d*).

Wherever, indeed, a man has made a false assertion calculated to lead

(*y*) *Milne* v. *Leisler*, 7 H. & N. 796; 31 Law J., Exch. 257. *Fursdon* v. *Clogg*, 10 M. & W. 572.

(*z*) *Harris* v. *Dignum*, 29 Law J., Exch. 23.

(*a*) *Pickard* v. *Sears*, 6 Ad. & E. 474. *Gregg* v. *Wells*, 10 Ad. & E. 98. *Piggott* v. *Stratton*, 29 Law J., Ch. 9.

(*b*) *Cave* v. *Mills*, 7 H. & N. 913; 31 Law J., Exch. 265.

(*c*) *Freeman* v. *Cooke*, 2 Exch. 603. *Cornish* v. *Abington*, 4 H. & N. 557. *Haines* v. *E. Ind. Co.*, 13 Moore, P. C. C. 57. *Loffus* v. *Maw*, 8 Jur. N. S. 607. *Dunston* v. *Paterson*, ante, pp. 490, 739.

(*d*) *Harding* v. *Carter*, Park. Ins. 5.

others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion. Wherever, also, he has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he will not be heard afterwards, as against such persons, to show that state of facts did not exist. In short, a man is not permitted, or at liberty, to charge the consequences of his own fault on others, and complain of that which he has himself brought about" (*e*).

Thus the principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution, is universally estopped from denying the authority of the agent. A retired partner, who has given no notice of dissolution to a customer, is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. The same principle applies to instruments under seal. But the party who claims the benefit of this doctrine of estoppel, must show that he has acted in the transaction in which he was deceived with ordinary caution (*f*).

When a party is estopped from withdrawing a credit given by mistake.— Where an agent carelessly gave credit to a principal for money he had never received, on the faith of which the principal drew the money and spent it, the agent was not allowed to set up the mistake as a ground of action for the recovery of the money which had been spent on the strength of his representation (*g*).

And where an agent employed to receive money, and bound by his duty to his principal to communicate to him whether the money has been received or not, renders an account from time to time, which contains a statement that the money has been received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit (*h*).

Proof of public and private statutes.— A public act of parliament is proved by the mere production of a volume of the statutes at large, containing the particular act purporting to be printed by the Queen's printer.

(*e*) Wilde, B., *Swan* v. *North Brit. Austr. Co.*, 31 Law J., Exch. 436.

(*f*) Erle, C. J., *Swan, ex parte*, 30 Law J., C. P. 118.

(*g*) *Skyring* v. *Greenwood*, 4 B. & C. 281. *Shaw* v. *Picton*, ib. 715. *Reg.* v. *Lords of the Treasury*, 16 Q. B. 361.

(*h*) Bayley, J., *Shaw* v. *Picton*, 4 B. & C. 729. *Cave* v. *Mills*, 7 H. & N. 625.

Originally private acts of parliament were required to be proved by a copy examined with the parliament roll. Clauses were then inserted declaring that a copy printed by the king's printer should be evidence. It was then objected, that in such cases it was necessary to prove that the act produced was in fact printed by the king's printer, whereupon by 8 & 9 Vict. c. 113, s. 3, it was enacted, that all copies of private, and local, and personal acts, if purporting to be printed by the Queen's printer, should be admitted as evidence thereof, without proof that such copies were so printed. And now, by 13 & 14 Vict. c. 21, s. 7, it is enacted, that every act of parliament made after the then next session of parliament shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act (*i*).

Acts of state may be proved by production of the London Gazette containing the ordinary announcement of them, without showing that the Gazette came from the Queen's printers, or that it was issued by authority (*k*).

Journals of parliament and royal proclamations. — By 8 & 9 Vict. c. 113, s. 3, it is enacted, that all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, shall be admitted as evidence, without proof that such copies were so printed.

Proof of criminal proceedings. — By the Law of Evidence Amendment Act (14 & 15 Vict. c. 99), reciting that it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings, it is enacted (s. 13), that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment of acquittal, as the case may be, omitting the formal parts thereof.

Records of the superior courts.—Records of the superior courts may be proved by an examined copy. "The evidence," observes Lord Ellenborough, "must be launched by proving that the original came either from the proper person, or out of the proper place of custody. This can-

(*i*) *Woodward* v. *Cotton*, 1 Cr. M. & R. 44.

(*k*) *Rex* v. *Holt*, 5 T. R. 436. *Rex* v. *Forsyth*, Russ. & Ry. 277.

not be shown by any light reflected from the record itself, which may have been improperly placed where it was found. Nothing can be borrowed *ex visceribus judicii*, till the original be proved to have come from the proper custody" (*l*). If, after a copy has been made of the original record, the clerk, or person who has the custody of it, reads it aloud, and the witness who produces the copy examines it by the light of such reading, this is sufficient, and it matters not whether the officer or the witness reads the record. It is good either way (*m*).

Proof of a judge's order.—The statute 8 & 9 Vict. c. 113, s. 2, enacts, as we have seen, that all judges, justices, &c., and judicial officers, shall thenceforth take judicial notice of the signature of any of the equity or common-law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

Records filed in the Petty-Bag Office, or common-law side of the Court of Chancery.—By 12 & 13 Vict. c. 109, s. 13, it is enacted, that every office copy issued from the Petty-Bag Office shall be sealed with the Chancery common-law seal for the time being; and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible, and admitted, and received in evidence before either House of Parliament, and before any committee thereof, and by and before all courts, judges, justices, officers, and other persons whomsoever, in like manner, and to the same extent and effect, as the original record or other document would or might be admissible, or admitted, or received, if tendered in evidence, as well for the purpose of proving the contents of such record or other document, as also proving such record or other document to be a record or document of or belonging to the said Court of Chancery, but not further or otherwise.

Proof of proceedings before magistrates.—The statute 11 & 12 Vict. c. 42, s. 17, requires, as we have seen, examinations before justices to be taken down in writing, so that oral evidence of the nature and substance of depositions and examinations before magistrates cannot be given in evidence, unless it be shown that the depositions have been lost or destroyed, and that they cannot be produced.

Proceedings in bankruptcy, and proof of title of assignees.—By the Bankrupt Act, 24 & 25 Vict. c. 134, ss. 203, 204, 206, 207, provision is made for the admission in evidence in all courts of the various orders, writings, and proceedings in bankruptcy, provided they purport to be sealed or signed as therein mentioned. And all courts, judges, justices,

(*l*) *Adamthwaite* v. *Synge*, 1 Stark. 183.
(*m*) *Reid* v. *Margison*, 1 Campb. 470. *Rolf* v. *Dart*, 2 Taunt. 50.

and persons acting judicially, and other officers, are to take judicial notice of the signature of the commissioners, or registrar, and of the seal of the Court of Bankruptcy subscribed or attached to any judicial or official proceeding or document.

Dispensation of proof of title of assignees.—A party to a suit may, by his conduct and actions in dealing with assignees in bankruptcy, have so recognised their title as to be afterwards precluded from requiring formal proof of it (*n*).

Proof by sworn or certified copies of books, registers, or original documents.—By the Documentary Evidence Act (8 & 9 Vict. c. 113, s. 1), reciting that it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint-stock and other companies, and certified copies of documents, by-laws, entries of registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; it is enacted, that whenever by any act then in force, or thereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be thereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence (*o*).

And by 14 & 15 Vict. c. 99, s. 14, it is further enacted, that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the

(*n*) *Dickinson* v. *Coward*, 1 B. & Ald. 677. *Inglis* v. *Spence*, 1 Cr. M. & R. 432.

(*o*) As to proof of foreign marriage, *Finlay* v. *Rudall*, 31 Law J., Prob. & Matr. 140.

officer to whose custody the original is intrusted, which officer is required to furnish such certified copy or extract to any person applying at a reasonable time for the same, and paying a reasonable sum, not exceeding fourteen pence for every folio of ninety words. And if such officer wilfully certifies (s. 15) any document as being a true copy or extract, knowing that the same is not true, he shall be guilty of a misdemeanour, and liable on conviction to imprisonment.

An extract from a parish register, therefore, signed by the curate of the parish, is admissible under this statute without proof of the signature of the curate (*p*); and so is a copy of a license for keeping, using, or employing stage-carriages (*q*).

Public documents admissible in evidence, on being produced from the proper custody, are parish registers, registers of births, marriages, and deaths, made pursuant to the Registration Act; the register of voters at a parliamentary election (*r*); rolls of courts barons; deposit and transfer-books of the Bank of England; assessments of land-tax, records, writings, plans, and official papers, deposited in the office of land-revenue; records and enrolments; land-tax assessments; registers of copyright; vestry-books and official documents belonging to the public offices, &c. &c. (*s*); the register of bills of sale filed in the Queen's Bench office (*t*); certificates of the registration of joint-stock companies (*u*); Act-books of the Ecclesiastical Court (*v*); by-laws of corporations and of railway companies, and public boards dealing with the interests of the public, and confirmed and allowed by the Board of Trade, the Secretary of State, or the Commissioners of Railways (*x*).

Proof of the Medical Register.—Books published and sold at the office of the General Council of Medical Education and Registration, headed "Medical Register," and purporting to be published by authority, pursuant to the Medical Act, 21 & 22 Vict, c. 90, have been held admissible in evidence under s. 27 of that statute, to prove the contents of the Register (*y*).

Evidence of manorial customs.—Proof of entries on the rolls of a manor court are admissible in evidence to prove manorial customs (*z*). A presentment in a manor court, setting forth the bounds of a manor, is likewise evidence of such bounds. When an ancient manor-book is offered in evidence, it must be proved that it comes from the proper custody (*a*).

(*p*) *Porter, in re*, 25 Law J., Ch. 777.
(*q*) 5 & 6 Vict c. 79, s. 10; 8 & 9 Vict. c. 113, s. 1.
(*r*) *Reed* v. *Lamb*, 6 H. & N. 75.
(*s*) 2 Taylor on Evidence, pp. 1274, 1275, 1281, 1283.
(*t*) *Grindell* v. *Brendon*, 28 Law J., C. P. 333.
(*u*) *Baker* v. *Cave*, 1 H. & N. 674.
(*v*) *Dorrett* v. *Meux*, 15 C. B. 142.
(*x*) *Motteram* v. *East. Co. Rail. Co.*, 7 C. B., N. S. 58; 29 Law J., M. C. 59. And see 8 & 9 Vict. c. 113, s. 1.
(*y*) *Pedgrift* v. *Chevallier*, 8 C. B., N. S. 246.
(*z*) *Doe* v. *Askew*, 10 East, 520. *Roe* v. *Parker*, 5 T. R. 26. *Damerell* v. *Protheroe*, 10 Q. B. 20.
(*a*) *Evans* v. *Rees*, 10 Ad. & E. 151.

Evidence of title and seizin may be proved by proof of the exercise of acts of ownership over land, and the exercise of acts of ownership may be established by production of expired and ancient leases, or counterparts of leases, executed by deceased persons or their deceased lessees (*b*); and declarations of deceased occupiers of land, as to the parties under whom they hold, are admissible in evidence, as we have seen, to show who was the owner of the inheritance in their time (*c*).

Proof of age.—The register of christenings is no evidence of the time of birth. Therefore, where a register of christenings was produced, from which it appeared that the defendant was christened in 1807, and the entry also stated that he was born in the year 1799, it was held that this entry could not be received as proof of the year of birth (*d*).

Proof on the part of the plaintiff. — The plaintiff is bound to prove his case to the satisfaction of the jury, and if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, then the jury cannot lawfully say that he has made it out (*e*).

If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, just as where a defendant who is charged with doing an act wilfully may be made responsible for the act and its consequences, whether done wilfully or not (*f*).

When affirmative pleas of justification are put upon the record with the general issue, the plaintiff's counsel may, if he pleases, not only prove the facts of the declaration, but also may in the first instance, and before the defendant's case is gone into at all, go into any evidence which tends to destroy the effect of the justification by way of anticipating the defence; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence, in reply, as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they cannot be allowed to go beyond it (*g*).

(*b*) *Doe* v. *Pulman*, 3 Q. B. 622. And see, as to land-tax assessments being evidence of seizin, *Doe* v. *Arkwright*, 2 Ad. & E. 182.

(*c*) *Peaceable* v. *Watson*, ante, p. 881. *Doe* v. *Coulthred*, 7 Ad. & E. 235. And see further, as to evidence of title, ante, pp. 227–240, 253–259.

(*d*) *Wihen* v. *Law*, 3 Stark. 63.

(*e*) Ld. Abinger, *Long* v. *Hitchcock*, 9 C. & P. 620.

(*f*) *Swinfen* v. *Ld. Chelmsford*, 5 H. & N. 920.

(*g*) *Pierpoint* v. *Shapland*, 1 C. & P. 447.

If evidence which ought to have been specially pleaded is allowed by a plaintiff to be introduced without objection, the court will not afterwards grant a new trial on the ground that he was taken by surprise.

Where an act of parliament prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. The plaintiff must, therefore, prove some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law (*h*).

Proof in particular actions.—Various matters of evidence necessary to be adduced in support of the plaintiff's claim in particular actions have already been shortly considered ; such as actions for the infringements of rights and privileges incident to the possession, and connected with the use and enjoyment, of land (ante, pp. 57, 126, 129); actions for nuisances and injuries arising from the negligent use and management of real property (ante, pp. 175–178 (*i*) ; for injuries to lands and tenements from waste, negligence, and fire (ante, pp. 213, 214) ; for trespasses upon real property (ante, pp. 253–260); trespass and conversion of chattels (ante, pp. 310–315) ; injuries from the negligent use and management of chattels, and the negligent performance of work (ante, pp. 347–349); actions for the negligent keeping and unlawful detention of chattels by bailees (ante, pp. 383–385) ; for negligence and breach of duty on the part of common carriers and innkeepers (ante, pp. 426–428) ; for wrongful distress and sale of things distrained (ante, pp. 475–478); assault and battery, and wrongful imprisonment (ante, pp. 513–517) ; malicious arrest, and malicious prosecution (ante, pp. 538–544) ; trespasses by judges, sheriffs, and ministerial officers of courts of justice, and the parties setting them in motion (ante, pp. 584–589) ; trespasses committed in the execution of warrants and orders of justices (ante, pp. 641–644) ; injuries resulting from the negligent exercise or abuse of statutory powers (ante, pp. 662, 668) ; actions for libel and slander (ante, pp. 719–729); fraudulent misrepresentation and deceit (ante, pp. 766–770); petitions for damages from adulterers (ante, pp. 797–800); actions for seduction (ante, pp. 807, 808).

Amendment of variances between the declaration of the cause of action and the proof adduced in support of it.—By 3 & 4 Wm. 4, c. 42, s. 23, it is enacted, that any court of record in civil actions, or any judge at *nisi prius*, may cause the record, writ, or document on which any trial may be pending in a civil action, where any variance shall appear between the

(*h*) *Chamberlaine* v. *Chester & Birk. &c. Rail. Co.*, 1 Exch. 877.

(*i*) As to injuries arising from the ruinous and dangerous state of gratings, forming part of a public highway, *Robbins* v. *Jones*, 33 Law J., C. P. 1, and *Fisher* v. *Prowse*, ante, pp. 143, 144.

proof and the recital on the record, &c. of any contract, custom, prescription, name, or other matter, in any particular in the judgment of such court or judge not material to the merits of the cause, and by which variance the opposite party cannot have been prejudiced in the conduct of his action or defence, to be forthwith amended, on such terms as to payment of costs or postponing the trial as the court or a judge shall think reasonable; and in case such variance shall be in some particular in the judgment of such court or judge not material to the merits, but such as that the opposite party may have been prejudiced thereby in the conduct of his action or defence, then the same may be amended on the payment of costs to the other party, and withdrawing the record and postponing the trial, as such court or judge shall think reasonable. The judge may, however, avoid (s. 24) the responsibility of deciding, by directing the jury to find the facts according to the evidence, and leave the question of the materiality of the evidence for the consideration of the court above.

In actions for libel and slander, the judge had power under this statute, if there was a variance between the libel or slander charged in the declaration and the writing adduced in evidence, or the words proved to have been uttered, to amend the variance, if the amendment did not create a new and different cause of action (*k*).

By the Common Law Procedure Acts (15 & 16 Vict. c. 76, s. 222, 17 & 18 Vict. c. 125, s. 96, and 23 & 24 Vict. c. 126, s. 36), it is now further enacted, that it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for (*l*).

The power of amendment given by these statutes is not confined to the amendment of variances, but enables the judge to amend by adding fresh plaintiffs in an action of ejectment (*m*), or a plea necessary for the trial of the substantial question between the parties (*n*). Whether or not the proposed amendment is necessary for the purpose of determining the real

(*k*) *Smith* v. *Knoweldon*, 2 M. & Gr. 564. *Southee* v. *Denny*, 1 Exch. 192. *Pater* v. *Baker*, 3 C. B. 854. *Saunders* v. *Bate*, 1 H. & N. 402.

(*l*) *Cornish* v. *Hockin*, 1 Ell. & Bl. 607. *Roles* v. *Davis*, 4 H. & N. 484. *May* v. *Footner*, 5 Ell. & Bl. 505. *Edwards* v. *Hodges*, 15 C. B. 477.

(*m*) *Blake* v. *Done*, 7 H. & N. 465; 31 Law J., Exch. 100; but not a fresh defendant, *Garrard* v. *Giubelei*, 11 C. B., N. S. 616; 31 Law J., C. P. 270.

(*n*) *Mitchell* v. *Crassweller*, 13 C. B. 239. *Charnley* v. *Grundy*, 14 C. B. 614.

question of controversy between the parties is a matter to be decided by the judge (*o*), but no amendment ought to be made which affords reasonable grounds of demurrer (*p*), or which alters the cause of action set forth on the face of the declaration into another and a different cause of action (*q*), unless it is manifestly necessary to determine the real question which both parties came to try (*r*).

The court will control the power of amendment where it has been improperly exercised, and interfere to do what is right between the parties where an amendment has been improperly made; but it will not interfere where the judge, in the exercise of his discretionary power, has thought fit to refuse the amendment (*s*).

Evidence of admissions.—A statement or declaration made in the presence of a party to a cause, may become evidence, as showing that the party on hearing such statement did not deny its truth; but such an acquiescence is worth little or nothing where the party hearing it, and not contradicting it, has no personal means of knowing either the truth or the falsehood of the statement (*t*). The same may be said of letters sent to a party who receives them in silence, and says and does nothing respecting them (*u*). Admissions of parties under a misapprehension of the responsibility which the law would cast upon them, is not such an admission as can be used with effect against them (*x*).

Offers to make compensation, or to pay money, not amounting to an admission of liability.—When a man, to prevent litigation, and by way of compromise, expresses a willingness to pay a sum of money, such conduct does not fairly raise an admission of such a liability as will make him answerable in law. Statements made to purchase peace and stave off litigation do not necessarily evince a consciousness of liability (*y*).

Effect of the improper reception or rejection of evidence—New trial.—Where evidence formally objected to at *nisi prius* is received by the judge, and is afterwards decided by the court to be inadmissible, the losing party is entitled to a new trial, unless it plainly appears that the evidence improperly admitted could have had no weight whatever with the jury, and no influence at all upon the verdict, for the court will not take upon themselves to decide upon the value of the evidence, or the degree of weight which the jury might have attached to it (*z*). So, if evidence

(*o*) *Wilkin* v. *Reed*, 15 C. B. 205; 23 Law J., C. P. 193.

(*p*) *Martyn* v. *Williams*, 1 H. & N. 827.

(*q*) *Bradworthy* v. *Foshaw*, 10 W. R. 700.

(*r*) *Mayor* v. *Footner*, 5 Ell. & Bl. 507. *St. Losky* v. *Green*, 11 C. B., N. S. 370.

(*s*) *Holden* v. *Ballantyne*, 8 W. R. 390; 29 Law J., Q. B. 148.

(*t*) *Hayslep* v. *Gymer*, 1 Ad. & E. 165.

(*u*) *Wright* v. *Tatham*, 7 Ad. & E. 313.

(*x*) Ld. Tenterden, *Bradley* v. *Waterhouse*, 3 C. & P. 321.

(*y*) Bullers, N. P. 236 b, 7th edn. *Thomas* v. *Morgan*. *Beck* v. *Dyson*, ante, p. 178.

(*z*) *De Rutzen* v. *Farr*, 4 Ad. & E. 53, overruling, on this point, *Doe* v. *Tyler*, 4 M. & P. 377.

material to the issue is tendered and rejected by the judge, the party tendering it, if he loses the verdict, is entitled to a new trial, and the court will not enter upon any inquiry as to whether there was not proof enough in the cause to warrant a verdict against the party on whose behalf the evidence was offered, supposing it to have been admitted; for the court cannot in any degree take upon itself the province of the jury (*a*).

Bill of exceptions. — If the judge improperly receives evidence which ought not to have been admitted, or rejects evidence which ought to have been received, the aggrieved party may, instead of moving for a new trial, tender a bill of exceptions. The bill of exceptions is in the nature of a writ of error, and cannot be determined in the court out of which the record issues (*b*).

(*a*) *Wright* v. *Tatham*, 7 Ad. & E. 330. *Crease* v. *Barrett*, 1 Cr. M. & R. 933, overruling, on this point, *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 559.

(*b*) Chitt. Arch. Pr., *Bill of Exceptions*.

CHAPTER XXII.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS EX DELICTO.

SECTION I.—*Of damages recoverable in actions ex delicto.*—Assessment of damages in actions ex delicto—Damages recoverable in particular actions—When special and extraordinary damages are recoverable as the natural or necessary consequence of the wrongful act—Damages too remote, and not naturally resulting from the wrong done—Expense of obtaining legal advice not recoverable—Costs of previous legal proceedings when recoverable—Damages which the plaintiff has become liable to pay through the default of the defendant—Prospective damages—Exemplary and vindictive damages—Evidence in aggravation and mitigation of damages—Recovery of damages from one of several co-trespassers—Damages when the plaintiff has insured against loss—Double and treble damages—New trial on the ground of excessive or small damages—Quashing of inquisitions of damages.

SECTION II.—*Recovery of costs in actions ex delicto.*—Award of costs to the successful party—Costs on particular pleas, on stay of proceedings, arrest of judgment, &c.—When the court has no jurisdiction it has no power to award costs—Of the staying proceedings until the costs of a former action have been paid—Effect on costs of withdrawing a juror—When the plaintiff is entitled to no more costs than damages—When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs—Certificate that the action was brought to try a right—Certificate to deprive a plaintiff of his costs—County court acts depriving a plaintiff of his costs—Certificate for costs, and rule, or order for costs, under these statutes—Costs on references—Certificate for full costs in cases of wilful and malicious trespass—Full costs after notice not to trespass—Costs in actions for wilful and malicious grievances.—Costs in actions against justices, constables, and others, in respect of things done under statutory powers—Costs in actions against executors—In actions upon judgments—New trials, appeals, removal by certiorari, prohibition, indictment, mandamus, and injunction—Double costs—Taxation of costs—Security for costs—Costs in the county court.

SECTION I.

OF DAMAGES RECOVERABLE IN ACTIONS EX DELICTO.

Of the assessment of damages in actions ex delicto (*c*).—In actions of tort a greater latitude is allowed by the court to a jury in the assessment

(*c*) As to damages recoverable in actions *ex contractu*, see Addison on Contracts, 5th edn. pp. 1047–1078.

of damages than is allowed in actions of contract (*d*). "The damages must be excessive and outrageous to warrant a new trial" (*e*); "for it is not to be expected that a jury will measure their verdict so nicely as in cases of contract" (*f*). Therefore, where some printers' devils, who had been unlawfully imprisoned for a week, brought their several actions, and the jury gave each of them 300*l.* damages, the court declined to meddle with the verdict, although it was proved that each of the plaintiffs had been well fed upon beef-steaks and porter during the whole period of their imprisonment.

The court will not in general interfere with the damages unless the finding has proceeded from some mistake; or the jury have acted from some sinister feeling, and the judge is dissatisfied with their verdict (*g*). If the jury give the plaintiff more damages than by his own showing he ought to recover (*h*), or if there be several counts in the declaration, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, the damages so assessed cannot be recovered, and a *venire de novo* must be awarded (*i*). If an action of slander be brought for words spoken at different times, and the action will not lie for the words spoken at one time, but will lie for words spoken at another, and a verdict is found for all the words, and entire damages are assessed, no judgment will be given (*j*); but when words are all spoken at one time, and some of them are actionable and some not, and damages are assessed generally, they shall be intended to be given only for those words which are actionable, and it shall be presumed that the others were inserted only for aggravation (*k*).

Damages recoverable in particular actions.—The damages recoverable in actions for obstruction to the enjoyment of rights incident to the possession and ownership of land have already been considered (ante, pp. 58, 59), also the damages recoverable in actions for obstructions to the enjoyments of profits *à prendre* and easements, and the infringement of incorporeal rights (ante, pp. 129, 130); in actions for nuisances and keeping ferocious animals (ante, pp. 178, 179); for injuries to real property from waste, negligence, and fire (ante, pp. 214–216); actions for trespasses upon real property (ante, pp. 261–265); trespass and conversion of chattels (ante, pp. 315–319); injuries from the negligent use and

(*d*) De Grey, C. J., *Sharpe* v. *Brice*, 2 W. Bl. 942.

(*e*) *Huckle* v. *Money*, 2 Wils. 205.

(*f*) Cresswell, J., *Williams* v. *Currie*, 1 C. B. 848. *Fabrigas* v. *Mostyn*, 2 W. Bl. 928.

(*g*) *Wallington* v. *Wood*, C. P. Nov. 8th, 1860. *Britton* v. *S. W. Rail. Co.*, 27 Law J., Exch. 355; see post, NEW TRIALS.

(*h*) *Hambleton* v. *Veere*, 2 Wms. Saund. 170.

(*i*) *Grant* v. *Astle*, Doug. 730. *Leach* v. *Thomas*, 2 M. & W. 427.

(*j*) Popham, J., *Brooke* v. *Clarke*, Cro. Eliz. 328. *Jaxon* v. *Tanner*, Cro. Car. 237.

(*k*) *Penson* v. *Gooday*, ib. 327. *Thaxbie* v. *Smith*, Cro. Eliz. 788. *Berkeley* v. *Earl of Pembroke*, Moore, 706. *Broughton's* case, ib. 708.

management of chattels, and the negligent navigation of vessels, and the negligent performance of work (ante, pp. 349–351); actions for compensating the families of persons killed by negligence (ante, pp. 350, 351); actions for the detention and loss of chattels by bailees (ante, pp. 386–388); for negligence and breach of duty on the part of common carriers, common ferrymen, common innkeepers, and lodging-house keepers (ante, pp. 428–430); actions for a wrongful distress and sale of things distrained (ante, pp. 478–480); actions for assault and battery and wrongful imprisonment (ante, pp. 517–519); malicious arrest and malicious prosecution (ante, pp. 544, 545); actions against sheriffs, bailiffs, and officers for negligence and breach of duty (ante, pp. 589–592); actions for trespasses committed under colour of warrants and orders of justices (ante, pp. 644, 645); statutory compensations for injuries authorised by statute (ante, pp. 663–668); actions for libel and slander (ante, pp. 729–731); actions for fraudulent misrepresentation and deceit (ante, pp. 770–772).

Where a person has been induced, by false accounts of the transactions and profits of a joint-stock company, to buy shares therein, and give for them a sum far beyond their real value, the measure of damages is the difference between the actual value of the shares at the time of the purchase, and the fictitious value imparted to them by the false representation (*l*).

As against a manifest wrong-doer a jury is, as we have seen, justified in making the strongest presumptions, so that if an article of value, such as a diamond necklace, has been taken away, and part of it is traced to the possession of the defendant, the jury may reasonably infer that the whole thing has come into his hands, and give damages accordingly (*m*). Where the plaintiff, by his own dealings and acts, renders the nature of his interest in the property and the extent of the damages altogether doubtful, he may vacate his whole claim, or destroy his right to more than nominal damages (*n*).

In an action by a judgment-creditor against a sheriff for an escape, where the sheriff had received the amount of the judgment-debt and costs from the judgment-debtor, and then discharged him, it appeared that the debtor was suffering in custody, that vain attempts had been made to find the plaintiff or his attorney to receive the money, and that the sheriff then received it and allowed the debtor to escape, it was held that the measure of damages was the amount of the debt and costs so received by the sheriff, and that the judgment-creditor was entitled to nothing further (*o*).

(*l*) *Davidson* v. *Tulloch*, 1 W. R. 309; 36 Law T. R. 97; ante, p. 740.
(*m*) *Mortimer* v. *Cradock*, ante, p. 316.
(*n*) Ante, p. 317. *Pringle* v. *Taylor*, 2 Taunt. 150.
(*o*) *Hemming* v. *Hale*, 29 Law J., C. P. 137.

In an action for oral slander, where the cause of action rests upon special damage alleged and proved, the jury, in assessing their damages, are not limited to the amount of special damage proved, but may give their verdict for general damages, which would in their judgment be the natural and probable result of it. They must, however, as we have seen (ante, p. 706), exclude from their consideration damages resulting from the repetition of the slander by third parties who had no authority from the defendant to repeat it (*p*).

When special and extraordinary damages are recoverable as the natural and necessary consequence of the wrongful act. — All damages which ordinarily and in the natural course of things might fairly be expected to result, and have resulted, from the commission of the wrongful act, are recoverable, provided they are claimed by the plaintiff in his declaration (*q*). If by reason of the defendant's negligence and breach of duty the property of the plaintiff has become deteriorated and reduced in value by rain, storm, or frost, or any destructive agencies of ordinary occurrence, the plaintiff will be entitled to recover all the damage he has sustained thereby (*r*). All persons are responsible for all the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look into all the circumstances and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*s*). Where the plaintiff has been compelled to pay money to release himself from the injurious consequences naturally resulting from the wrongful act of the defendant, such money is recoverable from the defendant as part of the damages. This is the case, as we have seen, where a plaintiff has been compelled to pay money to procure his release from a wrongful imprisonment by the defendant (ante, p. 519).

Whenever one person commands or authorises an act to be done by another, he is responsible for all that the other does in the necessary execution of his authority. If, therefore, an assault and imprisonment of the plaintiff are the necessary or probable consequence of orders given by the defendant, the defendant will be responsible in damages for such assault and imprisonment, although he did not directly order it, or contemplate the possibility of its occurrence (*t*).

In an action for breaking and entering the plaintiff's dwelling-house, and assaulting and beating him, Lord Ellenborough allowed the plaintiff

(*p*) *Dixon* v. *Smith*, 5 H. & N. 450; 29 Law J., Exch. 125. *Evans* v. *Harries*, 26 ib. 81. *Alsopp* v. *Alsopp*, 8 W. R. 449.

(*q*) Pollock, C. B., *Rigby* v. *Hewitt*, 5 Exch. 243. *Workman* v. *Gt. North. Rail. Co.*, 32 Law J., Q. B. 79. *Gilbertson* v. *Richardson*, 5 C. B. 502.

(*r*) *Smeed* v. *Foord*, 28 Law J., Q. B. 178.

(*s*) *Davis* v. *North-West. Rail. Co.*, 1 Jur. N. S. 1303. *Collard* v. *S. E. R. Co.*, 9 W. R. 697.

(*t*) *Glynn* v. *Houston*, 2 M. & Gr. 337.

to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died soon afterwards, not as a substantive ground of damage, but for the purpose of showing how outrageous and violent had been the conduct of the defendant (*u*). "But I entertain considerable doubt," observes Pollock, C. B., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated" (*x*).

When damages are too remote, and not naturally resulting from the wrong done, they are not recoverable (*y*).—Where a passenger on board ship was assaulted and imprisoned for one night by the captain, and in consequence thereof took the first opportunity of leaving the ship, and paid 100*l.* for his passage home in another vessel, it was held that in order to recover the 100*l.* as part of the damages for the assault and imprisonment, it was necessary for the plaintiff to prove that there was fair and reasonable ground for fearing a renewal of the ill-treatment, and that he left the vessel under the influence of such fear, and not merely because he was angered and displeased with the captain, and could not continue on board with ease and comfort (*z*).

Recovery of damages in actions of tort founded on contract—Damages not recoverable as being too remote.—When the action of tort is founded on a breach of contract, the damages recoverable are those which may fairly and reasonably be considered to arise naturally, according to the usual course of things, from the breach of contract itself, or which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances exist which render the neglect or breach of duty productive of more than ordinary injury and damage to the owner, such special circumstances must have been communicated to the defendant in order to make him responsible for the special and extraordinary damages resulting from any neglect or breach of duty on his part (*a*). A man cannot, by merely changing the form of his action, entitle himself to recover greater damages than those to which he is by law entitled according to the true facts of the case and the real nature of the transaction (*b*).

Expense of obtaining legal advice not recoverable.—The expense incurred by a plaintiff in consulting an attorney and obtaining a legal opinion

(*u*) *Huxley* v. *Berg*, 1 Stark. 98. *Bracegirdle* v. *Oxford*, 2 M. & S. 77.

(*x*) *Greenland* v. *Chaplin*, 5 Exch. 248.

(*y*) Ante, pp. 4–6. *Walker* v. *Olding*, 32 Law J., Exch. 142. *Wilson* v. *Lanc. & York. Rail. Co.*, ante, p. 430.

(*z*) *Boyce* v. *Bayliffe*, 1 Campb. 58.

(*a*) *Hadley* v. *Baxendale*, 9 Exch. 354. *Portman* v. *Middleton*, 4 C. B., N. S. 322; 27 Law J., C. P. 231. *Theobald* v. *Rail. Pass. Ass. Co.*, 10 Exch. 45. *Peterson* v. *Ayre*, 13 C. B. 353.

(*b*) *Chinery* v. *Viall*, 5 H. & N. 295.

upon the validity of his claim, are not recoverable as part of the damages. "Parties must do what they think is right, and the expense of getting the experience of attornies to advise is not to be repaid by the other party. Nothing of that sort can be allowed in damages, and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs" (*c*).

Costs of previous legal proceedings when recoverable.—A defendant in an action *ex delicto* is responsible in damages, as we have seen, for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in A's name, and on his account, and the plaintiffs supplied the stone, and afterwards sued A for the price, but failed in their action, and had to pay A's costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from A to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretence of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in A's name, but also the costs they had incurred and paid in the former action (*d*). In another case, where the agent believed that he had the authority he claimed to possess, and had no authority, it was held that the costs of a Chancery suit, which was occasioned by his false assumption of authority, were recoverable as part of the damages (*e*).

Where a tenant gave his landlord notice to quit, and then refused to give up possession, it was held, as we have seen, that the landlord was entitled to recover the costs of an action brought against him by a person to whom he had contracted to let the premises, but to whom he was unable to give possession in consequence of the refusal of the tenant to go out pursuant to his notice. "The letting to a new tenant," observes Cockburn, C. J., "is the ordinary course of dealing on the part of an owner of land under such circumstances. The defendant, therefore, must have understood, that when the plaintiff gave him notice to quit he would enter into a new contract with a new tenant to let the premises to him from the expiration of such notice. And in this case the tenant was apprised of the fact that the landlord had relet the premises, and was consequently aware of the inconvenience and loss he was exposing him to by his improper conduct" (*f*).

(*c*) *Clare* v. *Maynard*, 7 C. & P. 743.

(*d*) *Randell* v. *Trimen*, 18 C. B. 786; 25 Law J., C. P. 307. *Richardson* v. *Dunn*, 8 C. B., N. S. 655; 30 Law J., C. P. 47.

(*e*) *Collen* v. *Wright*, 7 Ell. & Bl. 311; 8 ib. 647, in error; 26 Law J., Q. B. 147; 27 ib. 215.

(*f*) *Bramley* v. *Chesterton*, 2 C. B., N. S. 605.

In an action for running down a ship, it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid 20*l.*, and the court ultimately decreed the payment of 45*l.*, with costs, to the salvors, and the plaintiff sought to recover these costs as part of the damage he had sustained, it was held that the proper question for the jury was, whether the plaintiff, in paying only 20*l.* into court, and risking the costs of the action, had pursued the course which a prudent and reasonable man would take in his own case, and that if the jury thought he had, the costs of the suit might be recovered (*g*).

If the buyer of a horse or a picture with a warranty, relying on the warranty, re-sells the horse or the picture with a warranty, and being sued thereon by his vendee, gives notice to the defendant of the action, and receives no direction from the latter to give up the cause, and proceeds to defend and is worsted, the costs and damages of the defence to that action are part of the damages which the plaintiff sustains by reason of the false warranty found against the defendant, and may be recovered by the plaintiff in an action against the defendant for damages for the breach of warranty (*h*). But if the plaintiff has made a rash and improvident defence, after having had an opportunity of ascertaining by examination that the warranty could not be supported, he will not be permitted to recover the costs of his defence (*i*); for "no person has a right to inflame his own account against another by incurring expenses in an unrighteous resistance to an action which he cannot defend with any prospect of success" (*k*). If the costs have been taxed, the taxed costs only can be recovered (*l*).

If a land agent professes to have authority from a landowner to let land, and signs an agreement for a lease, and the landowner repudiates the lease and denies the authority, and the intended tenant, relying on the representation of the agent, files a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit is given to the agent, and the latter fails to withdraw his assertion of authority, he will be liable to pay the costs of the Chancery suit if the suit proceeds, and it is established that he had not the authority he pretended to have (*m*). But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and

(*g*) *Tindall* v. *Bell*, 11 M. & W. 228.

(*h*) *Lewis* v. *Peake*, 7 Taunt. 152. *Pennell* v. *Woodburn*, 7 C. & P. 118. *Randall* v. *Rapée*, 27 Law J., Q. B. 266; 1 Ell. Bl. & Ell. 84.

(*i*) *Wrightup* v. *Chamberlain*, 7 Sc. 598.

(*k*) Ld. Denman, C. J., *Short* v. *Kalloway*, 11 Ad. & E. 31.

(*l*) *Grace* v. *Morgan*, 2 Sc. 793.

(*m*) *Collen* v. *Wright*, ante, p. 900.

giving him an opportunity of withdrawing or verifying his assertion of authority (*n*).

If the costs incurred in legal proceedings are not part of the consequences of the wrong done (*o*), or if they do not naturally result from the breach of any warrant of authority, or if they are the remote, unexpected, and unusual consequence of the wrong, they are not recoverable (*p*).

Recovery of damages which the plaintiff has become liable to pay through the default of the defendant.—A liability on the part of the plaintiff to pay damages to a third party, by reason of the default of the defendant, is enough, as we have seen, to enable the plaintiff to recover those damages from the defendant. It is not necessary that the money itself should be actually paid. Thus, where the defendant sold barley to the plaintiff, warranted to be chevalier seed-barley, and the plaintiff resold it with a similar warranty, and the barley was not chevalier seed-barley, and the sub-purchaser claimed damages from the plaintiff, whereupon the plaintiff fell back upon the defendant and sued him for these damages, it was held, as we have seen (ante, p. 771), that he was entitled to recover them, although he had not paid them to the sub-purchasers. "I consider," observes Crompton, J., "that it was not necessary that there should be a payment before the right to recover these damages accrued, and that the jury may well calculate all the mischief which, according to the breach of contract, might accrue to the plaintiffs. This matter has been a good deal discussed in cases of special damage, and it has been usual to give in evidence the amount of the bills sent in by surgeons and attornies, but it has never been said that the liability to pay is not enough to enable the plaintiff in an action of that kind to recover, and from the very nature of the thing here the amount of damages is ascertainable from the kind of crop which grows up. Then, another reason for so holding is, that according to the principle upon which damages are assessed they are only to be assessed once, and therefore the jury ought to take all these circumstances into consideration in estimating the amount of damages to which the plaintiffs are entitled" (*q*).

Recovery of a surgeon's bill and of a physician's fees as part of the damages.—Where the plaintiff had been wounded by the negligence of the defendant in the management of a gun, and had employed a surgeon and physician for the cure of the injury he had sustained, Lord Ellenborough told the jury, that as to the surgeon's bill they were to consider the amount as paid by the plaintiff, since the surgeon could compel the

(*n*) Wightman, J., 26 Law J., Q. B. 151.

(*o*) *Holloway* v. *Turner*, 6 Q. B. 928.

(*p*) *Pow* v. *Davis*, 1 Ell. B. & S. 220; 30 Law J., Q. B. 256. *Richardson* v. *Dunn*, 8 C. B., N. S. 655; 30 Law J., C. P. 44; ante, pp. 4–6.

(*q*) *Randall* v. *Raper*, 1 Ell. Bl. & Ell. 84; 27 Law J., Q. B. 208. *Spark* v. *Heslop*, 28 ib. 197. *Dingle* v. *Hare*, 29 ib. C. P. 143. Addison on Contracts, 1052, 1061.

payment of it as a legal debt, but that the physician's fees could not be taken into account, since they had not been actually paid, and the physician could not enforce payment by action (*r*).

Where the declaration alleged an actual payment of the charges of such third party, the allegation was held material, and necessary to be proved in order to enable the plaintiff to recover the amount of them (*s*).

Prospective damages are not recoverable where the cause of action is of a continuing nature, such as a nuisance arising from the obstruction of a drain, watercourse, or thoroughfare, where a fresh cause of action arises *de die in diem* as long as the obstruction lasts (ante, p. 179). But when the cause of action is not of a continuing nature, but has accrued once for all, the prospective as well as the present injury, sustained at the time the action was commenced, may, as we have seen (ante, pp. 518, 519), be regarded by the jury in determining what will be a fair compensation to be awarded to the plaintiff. But the future injury must be the natural and necessary result of the wrong done, and not the consequence of any further wrongful act giving rise to a fresh cause of action.

Although a plaintiff is not to be compensated for uncertain and doubtful consequences, which may never ensue, yet he is entitled to compensation for losses which will "almost to a certainty happen." The jury may take into their consideration, in making up their minds on the damages, losses which will in all probability be sustained by the plaintiff; for "when the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be most mischievous to say — it would be increasing litigation to say — you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages" (*t*).

In an action for an assault, battery, and mayhem, the plaintiff declared that the defendant beat his head against the ground, and that he brought an action for it against the defendant, and recovered no more than 11*l.*, and that since that recovery, by reason of the same battery, a piece of his skull came away. The defendant pleaded the recovery of the 11*l.* mentioned in the declaration in bar of the action, and the plaintiff demurred, and it was contended that the special subsequent damage was a sufficient foundation for the action, and that the jury could not have taken the subsequent damage into their consideration on the previous trial; but per Holt, C. J., "Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in

(*r*) *Dixon* v. *Bell*, 1 Stark. 289. *Loosemore* v. *Radford*, 9 M. & W. 657. *Spark* v. *Heslop*, 28 Law J., Q. B. 197.

(*s*) *Jones* v. *Lewis*, 9 Dowl. P. C. 150. *Pritchet* v. *Boevey*, 1 Cr. & M. 778.

(*t*) Best. C. J., *Richardson* v. *Mellish*, 2 Bing. 240.

evidence as that which in all probability would be the consequence of the battery, the plaintiff would have recovered damages for it. The injury which is the foundation of the action is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for the battery of his servant *per quod servitium amisit;* but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence, and must be intended to have been given in evidence in the former action; and we must presume that the jury gave damages for all the hurt that the plaintiff suffered, for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened" (*u*).

In an action for keeping a ferocious dog, which bit the plaintiff's apprentice and servant, and permanently injured his hand and arm, whereby he was disabled and prevented from serving the plaintiff in his business, the plaintiff claimed damages, not only for the loss of the services of the apprentice down to the time of the commencement of the action, but for the loss of the future services of the apprentice from thenceforth up to the time of the expiration of the apprenticeship; and the plaintiff having proved that his apprentice was permanently disabled, it was held that these prospective damages were recoverable, as they arose from the injury done at the time specified in the declaration. "It is argued," observes Littledale, J., "that a fresh action might be brought from time to time; but that is not so, the action being founded not upon the damage only, but upon the unlawful act and the damage. Without the special damage the action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act, and fresh damage" (*x*).

In estimating the damages in an action for a libel against a trader, the jury may take into consideration the prospective injury which will probably accrue to the trader from the publication of the libel (*y*). It has been said that the damage sustained at the time of the commencement of the action is all that the plaintiff can recover, and that the jury cannot take into account the prospective injury; but "it appears to me," observes Bosanquet, J., "that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period" (*z*). And the jury may, it seems, give damages for the mental

(*u*) *Fetter* v. *Beale*, 1 Ld. Raym. 339, 692; 1 Salk. 11; ante, pp. 518, 519.

(*x*) *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 305.

(*y*) *Gregory* v. *Williams*, 1 C. & K. 568.

(*z*) *Ingram* v. *Lawson*, 8 Sc. 477.

suffering arising from the apprehension of the future consequences of the publication of the libel (*a*).

In assessing the damages for a breach of warranty, if it appears that the plaintiff, who complains of a breach of warranty on the sale to him of certain articles, has himself re-sold the subject-matter of the warranty with a warranty, the jury ought to take this into consideration in assessing the damages, and give the plaintiff such a sum as it appears to be probable he will be compelled to pay by way of compensation to the sub-purchaser (*b*).

Where the plaintiff in an action against a railway company for damage resulting from the negligent construction of an embankment, had previously received compensation for the damage done to him by the construction of the railway works, it was held that the compensation related only to such known and contingent damage as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and that it did not embrace certain damage which afterwards arose from the negligent construction of the works, and which could not then have been foreseen (*c*).

When a plaintiff receives compensation under the railway acts for the damage he has sustained by reason of the construction of the railway works, the compensation is confined to that which is the natural and necessary result of the doing what is authorised to be done by the legislature, supposing it to be done carefully and judiciously. Damage resulting from the negligent execution of the works is no ground for compensation under these statutes, but must be made the subject of an action (ante, p. 648).

Of exemplary and vindictive damages.—We have already seen that in actions of tort the damages are left very much to the discretion and judgment of the jury; and in all cases of malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury, measured by any pecuniary standard, may be but small. "It tends," observes Heath, J., "to prevent the practice of duelling if juries are permitted to punish insult by EXEMPLARY DAMAGES. I remember a case where a jury gave 500*l.* damages for knocking a man's hat off, and the court refused a new trial" (*d*). "Where," observes Gibbs, C. J., "a man is disposed to disregard every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?" (*e*).

(*a*) *Goslin* v. *Corry*, 8 Sc. N. R. 25.
(*b*) *Randall* v. *Raper*, ante, p. 902.
(*c*) *Lawrence* v. *Gt. Northern Rail. Co.*, 16 Q. B. 643; 20 Law J., Q. B. 293. *Bagnall* v. *Lond. & North-West. Rail. Co.*, 7 H. & N. 423; 31 Law J., Exch. 153.
(*d*) *Merest* v. *Hervey*, 5 Taunt. 442; ante, pp. 262, 517.
(*e*) 5 Taunt. 441.

In an action for damages by a journeyman printer for an unlawful imprisonment under a general warrant, which had been issued by the Secretary of State without any information or charge laid before him, and without any person being named in the warrant, the jury gave 300*l.* damages, and a motion for a new trial, on the ground that the damages were excessive, was refused, though it appeared that the plaintiff had been in custody only six hours, and during that time he had been treated very well, and had sustained very little personal injury. "If the jury," observes Pratt, C. J., "had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant. They heard the king's council, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a severe and tyrannical manner. These are the ideas which struck the jury on the trial, and I think they have done right in giving EXEMPLARY DAMAGES" (*f*). So, where an action was brought by the plaintiff for the seduction of his daughter, and damages were recovered, and a motion for a new trial was grounded on circumstances showing the damages to be excessive, Wilmot, C. J., stated that "actions for seduction are brought for EXAMPLE'S sake; and although the plaintiff's loss in this case may not really amount to the value of 20*s.*, yet the jury have done right in giving liberal damages" (*g*).

And wherever the wrong or injury is of a grievous nature, done with a high hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, and by circumstances of aggravation, the jury are authorised in giving, and may be told to give, vindictive damages (*h*).

Wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or utter recklessness of the wrong-doer in offering the insult and injury; their belief in the groundlessness of the charge, and their desire to vindicate the character of the plaintiff (*i*). Thus, in all actions of libel and slander,

(*f*) *Huckle* v. *Money*, 2 Wils. 207.
(*g*) *Tullidge* v. *Wade*, 3 Wils. 18.
(*h*) *Thomas* v. *Harris*, 27 Law J., Exch. 353. Willes, J., *Bell* v. *Mid. Rail. Co.*, 10 C. B., N. S. 307; 30 Law J., C. P. 281. *Emblen* v. *Myers*, 6 H. & N. 54; 30 Law J., Exch. 71.
(*i*) *Doe* v. *Filliter*, 13 M. & W. 51.

where the object of the plaintiff is to clear himself from aspersions that have been cast upon him, the jury are in the habit of giving large damages, with a view of vindicating the plaintiff's character from the aspersions cast upon it. Where in an action against a colonel of militia for ordering the plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave 150*l.* damages, and a new trial was moved for on the ground that the man appeared to have been moderately punished, and not much hurt, and the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment (*k*).

Evidence in aggravation of damages—Insulting attacks on property or the person.—Surrounding circumstances of aggravation may, as we have seen, be given in evidence, for the purpose of enhancing the damages. Thus, in actions for trespasses upon land, it may be shown that the defendant persisted in trespassing after he had been warned off, or refused to go away after he had been desired to depart, or used threatening or insulting gestures. In all cases of trespass and entry into the house or lands of the plaintiff, a jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult, intentional annoyance, or injury (*l*). If a trespass in a house is alleged to have been committed under a false charge and assertion that the plaintiff had stolen property in her house, *per quod* she was injured in her credit, this circumstance may be given in evidence for the purpose of enhancing the damages (*m*).

Evidence in mitigation of damages.—The fact that the plaintiff has recovered the amount of his loss from an insurance company under a policy of insurance effected by him is not admissible, as will be seen (post, pp. 910, 911), in reduction of damages. Circumstances cannot be given in evidence in mitigation of damages where they would amount to a complete justification, and might have been pleaded as such ; but where they fall short of a complete justification, and do not amount to a defence to the action, they may be given in evidence in mitigation of damages, as establishing a less aggravated case against the defendant (*n*). Thus, in an action for an assault and battery, and Not guilty pleaded, the jury are not at liberty to take into consideration the circumstances that led to the assault, with a view to the reduction of the damages, if those circumstances amount to a justification, and could have been pleaded as such (*o*); but if they merely palliate the character of the offence and mitigate the

(*k*) *Benson* v. *Frederick*, 3 Burr. 1847.

(*l*) Abbott, J., *Sears* v. *Lyons*, 2 Stark. 318. *Emblen* v. *Myers*, ante, pp. 349, 906.

(*m*) *Bracegirdle* v. *Oxford*, 2 M. & S. 79.

(*n*) Tindal, C. J., *Perkins* v. *Vaughan*, 5 Sc. N. R. 886. *Speck* v. *Phillips*, 7 Dowl. 470; 5 M. & W. 281.

(*o*) *Watson* v. *Christie*, 2 B. & P. 224.

wrong, they are admissible in evidence in reduction of the damages under the general issue (*p*).

In an action for assaulting the plaintiff and seizing his goods, it may be shown in mitigation of damages that the defendant was a custom-house officer, and that the plaintiff was going away from a vessel with goods liable to duty, without paying the duty, whereupon the defendant detained him and took possession of his goods; for this evidence does not amount to a complete justification, inasmuch as a custom-house officer cannot forcibly take goods from the person without a previous demand (*q*). Where the defendant gave the plaintiff in charge for stealing fat, and it appeared that there was no legal evidence of any felony, but the defendant *bonâ fide* believed that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, Best, C. J., allowed the grounds of suspicion to be given in evidence in mitigation of damages (*r*).

In an action for libel and slander, where the plaintiff claims damages on the ground of the disparagement of his character, general evidence of the plaintiff's bad character prior to the publication of the libel is admissible in evidence, as we have seen, in reduction of the damages, but not evidence of the truth of the words spoken, or anything which, if pleaded, would have amounted to a justification (*s*). So, in actions for the seduction of daughters and servants, the character of the girl for virtue and morality prior to the seduction may, as we have seen (ante, p. 809), be impeached for the purpose of reducing the damages; and it may be shown that she was in the habit of keeping loose company, or indulging in immodest conversation.

Where the defendant wrote a novel, and the plaintiff in reviewing it went beyond the bounds of fair criticism and libelled the defendant and his family, and the defendant thrashed the plaintiff, who brought an action for the assault, it was held that the libel might be given in evidence in mitigation of damages, although it was the subject of another action by the defendant against the plaintiff; but the jury were told that as the defendant had chosen his remedy for the libel by his action for damages, he could not fairly be allowed to take much advantage of it in mitigation of damages in the action for the assault (*t*).

Where the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited in Pall Mall for money, where crowds went to see it, and the defendant went and hacked the picture in pieces, and the plaintiff claimed the full value of the picture,

(*p*) *Linford* v. *Lake*, 3 H. & N. 276; 27 Law J., Exch. 334.

(*q*) Ld. Denman, C. J., *De Gondouin* v. *Lewis*, 10 Ad. & E. 120.

(*r*) *Chinn* v. *Morris*, 2 C. & P. 361.

(*s*) Ante, p. 730; Keilw. 203 b. *Dennis* v. *Pawling*, Vin. Abr., EVIDENCE (1 b) pl. 16. *Watson* v. *Christie*, 2 B. & P. 224.

(*t*) *Fraser* v. *Berkeley*, 7 C. & P. 625.

and compensation for the loss of the exhibition, the defendant was permitted to show in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister, and the exhibition of it a public nuisance. "If," observes Lord Ellenborough, "this picture was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts" (*u*).

If a vendor has sold goods to a purchaser, and delivered them to him without payment of the price, and then, fearing that he never will be paid, goes and takes them out of the possession of the debtor, and the latter brings an action for damages, the jury cannot lawfully take into their consideration, in reduction or mitigation of the damages, the fact that the goods had not been paid for, and that there was reasonable ground to believe that the purchaser never would pay for them, as it would be equivalent to allowing a set-off of a debt in an action of trespass (*x*).

In actions for damages for seizing goods under irregular or void process, it is no ground for mitigation of damages that a regular judgment had been recovered against the plaintiff. Parties are not to extort even what is justly due by the improper execution of a warrant, and wherever goods are seized under process in a place to which the process does not run, the full value of the goods and all provable damage are recoverable (*y*).

Joint-trespasses—Recovery of damages from one of several co-trespassers. — We have already seen, that where several persons commit a trespass in pursuit of one common design, each is answerable for the aggregate damage done by all. This has been held to be the case where a number of persons have associated themselves together for the purpose of hunting over the plaintiff's land (*z*), or have joined in assaulting, beating, or wrongfully imprisoning the plaintiff (*a*). The jury cannot regularly assess several damages for one trespass with which the defendants are jointly charged; for though in fact one was more malicious and did greater wrong than the other, yet all coming to do an unlawful act, the act of one is the act of all the parties present; and it is a rule of law, that what the plaintiff hath laid joint in his declaration, the jury cannot sever (*b*).

(*u*) *Du Bost* v. *Beresford*, 2 Campb. 511.
(*x*) *Gillard* v. *Brittan*, 8 M. & W. 575.
(*y*) *Sowell* v. *Champion*, 6 Ad. & E. 407.
(*z*) *Hume* v. *Oldacre*, ante, p. 265.
(*a*) *Clark* v. *Newsam*, ante, p. 518.
(*b*) *Brown* v. *Allen*, 4 Esp. 158.

Whenever, therefore, two or more persons are charged with a joint-trespass, and both or all are found jointly guilty, the jury cannot afterwards assess several damages (*c*). The damages must be assessed against all jointly, though all may not have been equally culpable (*d*). Where an action of trespass was brought against three defendants, and two of them pleaded, and the other let judgment go by default, and several damages were given, the court held that the plaintiff might either take judgment *de melioribus damnis*, or enter a *remittitur* (*e*).

No contribution can be claimed as between joint-wrong-doers. If, therefore, a plaintiff who has recovered judgment against two defendants for a joint-trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damage from the other (*f*).

Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.—Where a contract of insurance has been entered into, and a loss has been sustained by the assured for which he has received indemnity from the underwriters, and the assured has afterwards brought an action against the wrong-doer who occasioned the loss and recovered damages, the insurer or underwriter who has paid the amount of the loss may recover from the assured the amount of the damages he has received from the wrong-doer. Thus, the owner of goods who has intrusted them to a carrier, by land or by water, to be carried, and insures them against loss, and then sustains loss through the negligence of the carrier, is entitled to recover an indemnity on the contract of insurance, and also the full value of the goods from the carrier who has lost them; but he is not entitled to double satisfaction. As soon as he has received from the underwriter or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable from the wrong-doer, and is bound to hand over to the insurer whatever monies he receives from the wrong-doer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering from the wrong-doer full compensation for the injury (*g*); and in such action the court will not allow the sum received by the plaintiff on the policy of insurance to be given in evidence in reduction of damages. "If a plaintiff who has received full indemnity for his loss under a contract of insurance, could not recover from a wrong-doer, the latter," observes Tindal, C. J., "would take the benefit of a policy of insurance without paying the premium."

In an action for an injury done to the plaintiff's vessel from negligence

(*c*) *Hill* v. *Goodchild*, 5 Burr. 2791.
(*d*) *Eliot* v. *Allen*, 1 C. B. 18.
(*e*) *Sabin* v. *Long*, 1 Wils. 30.
(*f*) *Merryweather* v. *Nixan*, 8 T. R. 186.
(*g*) *Randal* v. *Cockran*, 1 Ves. sen. 97.

in running it down at sea, the fact of the plaintiff's having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's claim for damages (*h*). And where certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the assured against the hundred, under the statute to recover compensation for the injury (*i*).

Recovery of money paid under duress, or obtained by extortion. — Where goods are unlawfully detained, or an injurious act is about to be done to them, or some act which it was the duty of a party to do in respect of them be refused to be done unless money be paid, and the money be paid under protest as the only means of avoiding the immediate injury which would result from the detainer, the injurious act, or the wrongful refusal, the money so paid may be recovered back (*k*).

Recovery of double and treble damages. — Various statutes give, as we have seen, double and treble damages against persons who violate their provisions, such as the statutes prohibiting and punishing a forcible entry into lands and tenements (*l*); or the improper impounding of a distress (*m*); or the levying of a distress where no rent is due (ante, pp. 451, 470); or the rescuing a distress (*n*); or the taking by sheriffs' bailiffs, their officers, deputies, &c., more than the appointed fees or recompense on executions (ante, pp. 569, 581, 582). In these cases, it should be ascertained at the trial whether the amount of damage assessed by the jury is the actual damage sustained, or the statutory damage of double or treble the actual damage; for if the jury assess the damages generally at a certain sum, and there is nothing on the record to show that the jury have found only the single value, the court cannot allow the matter to be explained by affidavit and the postea amended; for they are bound to conclude from the postea that the jury have taken into their consideration and have assessed all the damages that the plaintiff is entitled to recover. But if the jury find the actual or single damage expressly, then the plaintiff may come into court to have the judgment entered up for double or treble value according to the statute (*o*).

In the case of actions brought by the crown for penalties of double or treble the amount of duty fraudulently kept back, the practice appears to be "for those who attend to the interests of the crown to get the jury to find the actual amount of the duty which ought to have been paid, and

(*h*) *Yates* v. *Whyte*, 5 Sc. 640; 4 Bing. N. C. 272.

(*i*) *Mason* v. *Sainsbury*, 3 Doug. 64. *Clark* v. *Blything*, 2 B. & C. 254; 3 D. & R. 489.

(*k*) Coleridge, J., *Glynn* v. *Thomas*, 11 Exch. 878. Addison on Contracts, 5th edn. pp. 29–31.

(*l*) 8 Hen. 6, c. 9; Dyer, 214 a.

(*m*) 1 & 2 Ph. & M. c. 12, s. 1.

(*n*) 2 Wm. & M. sess. 1, c. 5, s. 4.

(*o*) *Baldwyn* v. *Girries*, Godb. 245. *Sandford* v. *Clarke*, 2 Chitt. 352. *Buckle* v. *Bewes*, 4 B. & C. 154. *Baker* v. *Brown*, 2 M. & W. 199.

then, without any further communication with them, to enter up judgment for double or treble the amount" (*p*). When the jury have by their verdict found only the single damage, the application to the court to increase the damages to the statutory amount should, it seems, be made within four days of the return of the jury process (*q*).

New trial on the ground of excessive and outrageous damages.—"I should be sorry to say," observes Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury" (*r*). "I always have felt that it is extremely difficult to interfere, and say when damages are too large. You may take twenty juries, and every one of them will differ from 2000*l.* down to 200*l.* Nevertheless, it is now well acknowledged in all the courts of Westminster Hall, that if the damages are clearly too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct" (*s*).

"I think further," observes Ashhurst, J., "that before the court can set a verdict aside merely for excess of damages, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the court have some medium to direct them by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the court have no line to go by; and, therefore, it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages" (*t*).

But when there is any rule or guidance for the assessment of the damages, and the jury have not been properly directed on the point, or have disregarded the ruling of the judge, and have manifestly given excessive damages, the court will grant a new trial. So where the plaintiff has himself fixed the amount of damage and received it, and the jury give him a sum altogether disproportionate to his own estimate, the court will interpose and grant a new trial, unless the plaintiff consents to reduce the damages to a reasonable amount. Thus, where an importunate beggar having refused to quit the defendant's premises, the defendant

(*p*) *Attorney-General* v. *Hatton*, 1 M'Clel. 216.

(*q*) *Masters* v. *Farris*, 1 C. B. 716.

(*r*) *Gilbert* v. *Burtenshaw*, Cowp. 230; Lofft. 771. *Britton* v. *South Wales Rail. Co.*, 27 Law J., Exch. 355.

(*s*) *Hewlett* v. *Cruchley*, 5 Taunt. 281. *Pym* v. *Gt. North. Rail. Co.*, 31 Law J., Q. B. 252.

(*t*) *Duberley* v. *Gunning*, 4 T. R. 656.

ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn, and was brought before the plaintiff the following morning, when he demanded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half-a-crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and there being no plea of accord and satisfaction on the record, recovered a verdict with damages to the amount of 100*l.*, it was held that the damages were enormous and disproportionate, on account of the limit which the plaintiff himself had put on his demand in the first instance. "It seems to me," observes Tindal, C. J., "that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for 100*l.* is far beyond the merits, as we cannot but see, on the evidence of the plaintiff himself, who has set the measure on his own damages" (*u*).

Wherever the facts show that the plaintiff has taken upon himself to avenge his own wrongs, and to retaliate upon the defendant, these facts ought to be taken into consideration by the jury in reduction of damages; and if the jury have not been directed to do this, or have disregarded the direction, and have given excessive damages, the court will grant a new trial. Where an action was brought by a servant for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow for impertinent behaviour, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered 40*l.* damages, the court granted a new trial (*x*).

When also the plaintiff himself has been guilty of misconduct in the matter of his complaint, and does not come into court with clean hands and a fair case for damages, and the circumstance has been overlooked by the jury, and excessive and disproportionate damages have been given, the court will allow the matter to be revised by another jury (*y*). And when a defendant against whom excessive damages have been recovered appears to have been acting in the discharge of some duty, or in the intended execution of an act of parliament, or in the *bonâ fide* exercise of some power or authority which he supposed that he possessed, and intended to act right, but by mistake did wrong, and the damages are manifestly out of all proportion to the injury actually sustained, the court will interfere and grant a new trial for the purpose of confining the damages within moderate and reasonable limits (*z*).

(*u*) *Price* v. *Severn*, 7 Bing. 319.
(*x*) *Jones* v. *Sparrow*, 5 T. R. 257.
(*y*) Buller, J., 4 T. R. 658.
(*z*) *Eliot* v. *Allen*, 1 C. B. 40.

New trial on account of the smallness of the damages.— A new trial will sometimes be granted in actions *ex delicto* for smallness of damages, when it appears that if the plaintiff is entitled to a verdict at all he is manifestly entitled to much greater damages than have been given by the jury. Thus, where it was proved that by reason of the defendant's negligence in driving an omnibus the plaintiff was run over and his thigh broken, and that the doctor's bill for setting his leg and attending upon him came to 10*l.* 5*s.* 6*d.*, and the jury gave the plaintiff a verdict with a farthing damages, the court ordered a new trial (*a*). But when there is no standard for estimating the damages, and the court are unable to lay down any rule for the guidance of the jury, the court will not grant a new trial, although they may think the damages much too small (*b*).

Arrest of judgment where the plaintiff has a verdict for greater damages than by his own showing he ought to recover.— Whenever some of the damages claimed in the declaration are not legally recoverable, and damages are assessed generally, so that the plaintiff has recovered more damages than he ought, judgment will be arrested (*c*). Where the plaintiff declared against the defendant for seducing the plaintiff's apprentice from his service, and for the loss of the service of the apprentice for the whole residue of the term of apprenticeship, and the jury assessed the damages generally, and it appeared that the term was not expired, judgment was arrested on the ground that the plaintiff was not entitled to recover damages for all the term, as well for the time to come as for the time past, as claimed in the declaration ; for the apprentice may return to his master and serve him for the residue of the term yet to come, or the master may compel the apprentice by law to serve him for the residue of the term, and the plaintiff ought not to have both the service and damages for the loss of it (*d*).

" The cases seem to establish this principle, that where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested ; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment " (*e*).

The plaintiff can recover no more damages than he has claimed in his declaration, although the jury give him more, for he best knows the

(*a*) *Armytage* v. *Haley*, 4 Q. B. 918.
(*b*) *Strafford's* case, cited by Kenyon, C. J., 4 T. R. 655.
(*c*) *Prince* v. *Molt*, 2 Salk. 663.
(*d*) *Hambleton* v. *Veere*, 3 Wms. Saund. 170.
(*e*) See the note to *Hambleton* v. *Veere*, 3 Wms. Saund. 171c.

measure of his own wrong, and the amount of compensation to which he is entitled. If, therefore, the jury give him more than he claims, he must relinquish the extra damages, or there will be error on the record (*f*).

Inquisition of damages before the sheriff.—When judgment has been suffered by default in an action of tort, a writ of inquiry must be issued for the summoning of a jury, and the assessment of the damages before the sheriff (*g*). The plaintiff must appear at the time and place appointed for the execution of the writ, and prove the amount of damages sustained by him; and he must be careful to confine his claim to matters which can lawfully be made a ground for compensation; for if he gives evidence of losses which are not the natural result of the injury of which he complains, and induces the jury to include in their verdict damages which are not legally recoverable, the court will set aside the inquisition (*h*), unless it appears that no objection was taken by the defendant, and that both parties mutually consented to take the verdict of the jury upon the matters submitted to them. It is the duty, however, of the sheriff to point out to the jury the true grounds and measure of compensation, and if he directs them wrongly, and they go beyond their authority, the court will interfere to set matters right.

SECTION II.

OF THE RECOVERY OF COSTS IN ACTIONS EX DELICTO.

Award of costs to a successful plaintiff in the superior courts.—The expenses that a party has incurred in obtaining his right, such as the fees of counsel, attornies, and the expenses of witnesses, are termed costs, and these are given by the court and taxed by their officer. "In contemplation of law the word damages emphatically includes costs. It is so considered by Lord Coke, and in various authorities. Costs, therefore properly fall under the *nomen generale* of damages" (*i*).

Before the statute of Gloucester there was no mode of giving a successful plaintiff his costs unless the jury assessed them, and included them in the amount of damages, but that statute (6 Ed. 1, c. 1) enables

(*f*) *Cheveley* v. *Morris*, 2 W. Bl. 1300.
(*g*) Chitt. Arch. Pr., INQUIRY.
(*h*) *Penny, in re*, 7 Ell. & Bl. 668; 26 Law J., Q. B. 225.
(*i*) Per Ld. Ellenborough, C. J., *Phillips* v. *Bacon*, 9 East, 303; Co. Litt. 257a.

the plaintiff to recover his costs, by the judgment of the court, in all cases where he recovers damages (*k*). And the stat. 4 Anne, c. 16, for the amendment of the law enabling defendants to plead several matters of defence, enacts (s. 5) that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall be given in like manner, unless the judge who tried the issue shall certify that the defendant had a probable cause to plead such matter (*l*).

Costs to a successful defendant.—By the stat. 23 Hen. 8, c. 15, it is enacted, that if the plaintiff, in any action of detinue, or account, or upon the case, or upon any statute for any offence or personal wrong, should be nonsuited, or a verdict should pass against him, the defendant should have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judges of the court. And the stat. 4 Jac. 1, c. 3, reciting this statute of Hen. 8, and its beneficial operation, enacts (s. 2), that if any person shall commence any action of trespass or ejectment, or any other action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff or demandant be nonsuited, or any verdict happen to pass against him, then the defendant shall have judgment to recover his costs against the plaintiff or demandant. This statute, therefore, gives a successful defendant his costs in all cases where the plaintiff, if successful, would be entitled to costs (*m*).

In actions of ejectment, if the plaintiff is nonsuited at the trial, the defendant is entitled to his costs (*n*). And by 8 and 9 Wm. 3, c. 11, s. 1, it is further enacted, that where several persons shall be made defendants to any action or plaint of trespass, assault, or false imprisonment, and any one or more of them shall, upon the trial thereof, be acquitted by verdict, every person so acquitted shall recover his full costs of suit, unless the judge shall immediately after the trial, in open court, certify upon the record under his hand that there was reasonable cause for making such person a defendant. And (s. 2) that if upon any demurrer, either by the plaintiff or defendant, judgment shall be given against such plaintiff; or if, after judgment given for the defendant, the plaintiff shall sue a writ of error, and the judgment shall be affirmed, or the writ be discontinued, or the plaintiff shall be nonsuited therein, the defendant shall have judgment to recover his costs, and have execution for the same.

(*k*) *Jackson* v. *Calesworth*, 1 T. R. 72. As to costs in actions of ejectment, see New Pleading Rules, Hil. Term, 1853, R. 29, 30; 1 Ell. & Bl. Appendix, lxxxiii.

(*l*) As to costs under this statute, see *Partridge* v. *Gardner*, 4 Exch. 306. *Howell* v. *Rodbard*, ib. 311.

(*m*) *Cobbett* v. *Wheeler*, 30 Law J., Q. B. 64.

(*n*) New Pleading Rules, Hil. Term, 1853, R. 29, 30; 1 Ell. & Bl. App. lxxxiii.

Sect. 32 of 3 and 4 Wm. 4, c. 42, also enacts, that where several persons shall be made defendants, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall recover his reasonable costs; and if a verdict shall pass (s. 32) for any one or more of them, every such person shall have judgment for and recover his reasonable costs, unless the judge shall certify that there was reasonable cause for making him a defendant. And by s. 34 of this statute it is enacted, that in all writs of *sci. fa.* the plaintiff, obtaining judgment on an award of execution, shall recover his costs upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined, and that where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon demurrer in such action, the successful party shall have his costs.

Costs on pleas setting up matters of defence which have arisen since the last pleading.—It seems that formerly, if a defendant pleaded *puis darrein* continuance, that pleading operated as a withdrawal of all other pleas, and the defence rested on this alone, so that the plaintiff had nothing but this one plea to traverse; and if he was obliged to confess this he could get no costs, because he could only get them under the statute of Gloucester by a judgment, and the defendant was entitled to judgment. But justice seemed to require that if the plaintiff was prosecuting a just claim up to a certain point, he ought to have his costs of suit up to that time, and the pleading rules made under statutory authority have accordingly given the plaintiff his costs up to the time of pleading the plea, if he admits the truth of it (*o*).

Costs on a stay of proceedings.—Upon a summons to stay proceedings, on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons (*p*). Where a suit is altogether frivolous and vexatious, as in the case of an action in the superior courts for a sum under 40*s.*, the court will stay the proceedings (*q*).

Costs on arrest of judgment, or judgment non obstante veredicto.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted (s. 145), that upon an arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading for defect of which such judgment is given, upon which

(*o*) Reg. Gen. Trin. Term, 1853, R. 22, 23; 1 Ell. & Bl. App. lxxxii. *Howarth* v. *Brown*, 32 Law J., Exch. 99. *Bennett* v. *Lond. & N. W. Rail. Co.*, 5 H. & N. 604; 29 Law J., Exch. 473.

(*p*) *Walton* v. *Brown*, 3 H. & N. 879.

(*q*) *Stuart* v. *Cawse*, 5 C. B., N. S. 737; 28 Law J., C. P. 193. *Wellington* v. *Arters*, 5 T. R. 64.

such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any (*r*).

Where the court has no jurisdiction it has no power to give costs.—When a case has been dismissed by a court of law for want of jurisdiction, the court cannot give judgment for costs (*s*), unless it is empowered so to do by express statutory authority (*t*). By the County Court Act (9 & 10 Vict. c. 95, s. 79), it is enacted, that if the plaintiff shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant; and in case where the defendant shall appear and shall not admit the demand, to award to the defendant by way of costs such sum as the judge shall think fit; and it has been held that this enactment does not empower the judge to nonsuit and award costs when the case is out of his jurisdiction, for the plaintiff might be able conclusively to prove the cause of action brought before the court, but for the objection to the jurisdiction on the part of the defendant. Under such circumstances the court has merely power to declare its own incompetency to try the cause, and to direct that the suit shall abate, the plea to the jurisdiction being a plea in abatement of the suit. "We are of opinion," observes Pollock, C. B., "for the same reasons, that the provision over costs in the 88th section of the same act only applies to cases within the jurisdiction of the county court to hear and determine" (*u*).

Of staying proceedings until the costs of a former action have been paid.—Where a party has brought an action, and has had an opportunity of trying that action upon the merits, and has either failed upon the merits or has withdrawn his case, and afterwards brings a second action for the same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent and stay the proceedings in the second action (*x*). In determining the question, whether the second action is for the same cause as the first, the court will look at all the surrounding circumstances, to see whether the difference, if there be any, between the two actions is merely colourable, or whether the second action is for a substantially different cause (*y*). And although the parties be not the same, yet if it appears that the second action is on the same title, and for the same cause of action, the court will stay the proceedings until the costs of the first action have

(*r*) *Whaley* v. *Laing*, 8 W. R. 439.

(*s*) *Strader* v. *Graham*, 18 How. Rep. Supreme Court, U. S. 602. *Reg.* v. *Justices of Hampshire*, 32 Law J., M. C. 47. *Isle of Wight Ferry Co.* v. *Ryde Com. &c.*, 7 L. T. R., N. S. 391.

(*t*) 8 & 9 Wm. 3, c. 30, s. 3; 12 & 13 Vict. c. 45, s. 6.

(*u*) *Lawford* v. *Partridge*, 1 H. & N. 626; 26 Law J., Exch. 147.

(*x*) *Weston* v. *Withers*, 2 T. R. 511. *Crawley* v. *Impey*, 8 Taunt. 407; Chitty's Arch. Pr. 1299.

(*y*) *Houre* v. *Dickson*, 7 C. B. 164.

been paid (*z*). But the court will not interfere where it appears that the plaintiff was prevented from trying the first action on the merits, and that the second action has not been brought oppressively and vexatiously (*a*).

Effect on costs of withdrawing a juror.—If on the trial of a cause a juror is withdrawn by consent of the parties, each party pays his own costs (*b*); there is an end to the action, and no future action can be brought for the same cause, whatever may be the understanding and belief of the parties or their attornies at the time the step is taken. If, therefore, a second action is brought, the court will stay the proceedings therein (*c*).

When the plaintiff is entitled to no more costs than damages.—By 43 Eliz. c. 6, s. 2, it is enacted, that if upon any action personal to be brought in any of her Majesty's courts at Westminster (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery), it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40*s.* or above; that in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions.

So much of this statute as relates to costs in actions of trespass or case has been repealed by 3 & 4 Vict. c. 24, s. 1, which wholly deprives the plaintiff of costs where he recovers less than 40*s.* damages, unless the judge or presiding officer certifies that the action was brought to try a right, or that the trespass or grievance was wilful and malicious (post, p. 922).

Where no more costs than damages can be recovered in actions of slander.—By 21 Jac. 1, c. 16, s. 6, it is further enacted, that in all actions for slanderous words, if the jury upon the trial of the issue in such actions, or the jury that shall inquire of the damages, do find or assess the damages under 40*s.*, the plaintiff shall have and recover only so much costs as the damages so given or assessed amount unto. In the construction of this statute it was held, that where the words are in themselves not actionable, but the action is maintainable by reason of special damage sustained by the plaintiff, the statute does not apply, and the plaintiff is consequently entitled to full costs, though the damages are under 40*s.*,

(*z*) *Morgan* v. *Nicholl*, 3 H. & N. 215.

(*a*) *Danvers* v. *Morgan*, 17 C. B. 530, where it was erroneously supposed that the interference of the court was limited to actions of ejectment.

(*b*) *Stodhart* v. *Johnson*, 3 T. R. 657.

(*c*) *Gibbs* v. *Ralph*, 14 M. & W. 804; 15 Law J., Exch. 7.

for it is not the words but the special damage which is the cause of the action; but that when the words are actionable in themselves, and the special damage is laid by way of aggravation, then if the damages are under 40*s.* there should be no more costs than damages, for the action is properly an action for words within the statute (*d*).

The statute 3 & 4 Vict. c. 24, s. 2, enacts (post, pp. 921, 922), that if the plaintiff in any action on the case in the superior courts, or the court of Common Pleas at Lancaster or Durham, recovers by the verdict of a jury less than 40*s.* damages, he shall not be entitled to any costs unless the judge or presiding officer certifies in manner therein provided that the grievance was wilful and malicious. This section of the statute does not conflict with the 21 Jac. 1, c. 16, s. 6, so as to repeal it, but both enactments stand together. If the judge certifies under s. 2 of the statute of Victoria, the certificate will have the effect of taking the case out of the enacting part of that section, and will leave the plaintiff in the same position with respect to costs as he would have been in if the 3 & 4 Vict. c. 24, had never been passed. In cases where the statute of Gloucester (ante, p. 915) applies, this would give the plaintiff his full costs, but where the right under the statute of Gloucester is qualified by any subsequent statute, the certificate under 3 & 4 Vict. c. 24, leaves the plaintiff with that qualified right. A plaintiff, therefore, in an action for slander, who has obtained a certificate under the 3 & 4 Vict. c. 24, is entitled to the same costs as he would have been entitled to if that statute had not been passed, *i. e.* independently of 21 Jac. 1, c. 16, to full costs, and under that statute to as much costs as damages (*e*). Where, therefore, the words giving rise to an action of slander are not actionable in themselves, and the action is maintainable only by reason of special damage, the certificate of the judge or presiding officer under the statute 3 & 4 Vict. c. 24, s. 2 (post, p. 922), will entitle the plaintiff to full costs (*f*).

Where to a declaration for slander the defendants pleaded Not guilty and a justification, and at the trial no evidence was offered upon the second issue, and a verdict was given thereon for the plaintiff without any damages; but under the issue upon the first plea of Not guilty the defendants proved that the words spoken were a privileged communication, and upon that issue the verdict was for the defendants, it was held that the statute of James did not affect the case, and that the plaintiff was entitled to his full costs upon the second issue (*g*).

(*d*) *Burry* v. *Perry*, 2 Ld. Raym. 1588. *Brown* v. *Gibbons*, ib. 831; 1 Salk. 236.

(*e*) *Evans* v. *Rees*, 9 C. B., N. S. 391; 30 Law J., C. P. 16. *Goodall* v. *Ensell*, 2 Cr. M. & R. 249.

(*f*) *Burry* v. *Perry*, ut sup.

Turner v. *Horton*, Barnes, 132; Willes, 438. *Foster* v. *Pointer*, 8 M. & W. 398; 1 Wms. Saund. note to *Craft* v. *Boite*, 246a.

(*g*) *Skinner* v. *Shoppee*, 8 Sc. 275; 6 Bing. N. C. 131.

Where to an action for a libel in a newspaper the defendant pleaded the insertion of an apology and payment of 40*s.* into court (ante, p. 718), and the jury found that the apology was not sufficient, but that the money paid into court was sufficient to cover the damage sustained, and thereupon the judge directed a verdict for the plaintiff with 1*s.* damages, it was held that the plaintiff was deprived of costs, and that the plea not being proved, the payment into court was not warranted by law, and the defendant ought to have his money back again. "The damages," observes Pollock, C. B., "should have been assessed wholly irrespective of the plea" (*h*).

Where the plaintiff has in fact recovered more than 40*s.* by bringing the action, the case is not within the statute. If, therefore, as much as 40*s.* has been paid into court by the defendant, and the plaintiff, not considering it enough, goes on with his action, and recovers only a shilling damages beyond the amount paid into court, the plaintiff is not deprived of his costs, by a certificate from the judge that the verdict was for one shilling and no more (*i*).

When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs.—By the statute 3 & 4 Vict. c. 24, s. 1, repealing the statute 43 Eliz. c. 6, so far as it relates to costs in actions of trespass or case, and so much of 22 & 23 Car. 2, c. 9, as relates to costs in personal actions, it is enacted (s. 2), that if the plaintiff in any action of trespass or trespass on the case in any of the courts at Westminster, or the court of Common Pleas at Lancaster or Durham, shall recover by the verdict of a jury less than 40*s.* damages, the plaintiff shall not be entitled to recover any costs whatever, whether it shall be given upon an issue tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action has been brought, or that the trespass or grievance in respect of which the action is brought was wilful and malicious. But the act is not to deprive any plaintiff of costs in an action for trespasses on lands and dwellings after notice not to trespass (post, p. 930).

Under this statute, the under-sheriff who presides at a writ of inquiry of damages after judgment by default may grant the certificate, but he should sign it in the name of the sheriff, and not in his own name (*k*).

Certificate that the action was brought to try a right.—Wherever a defendant in an action for a trespass upon the plaintiff's land sets up a *bonâ*

(*h*) *Lafone* v. *Smith*, 4 H. & N. 158. *Newton* v. *Rowe*, 1 C. B. 187.
(*i*) *Richards* v. *Black*, 6 C. B. 448.
(*k*) *Stroud* v. *Watts*, 2 C. B. 929.

fide claim to the enjoyment of some easement, privilege, or profit thereon, such as a right to take water from the plaintiff's well, or to dig turves on the plaintiff's common (ante, c. 2), and has any colourable ground for the claim, the action is brought to try a right, and the judge or presiding officer ought to certify to that effect upon the record (*l*). In actions for a nuisance, there is in general a question of right between the parties. The action may be brought to recover damages for the infringement of an acknowledged right, or to try whether the defendant has a right to do the act of which the plaintiff complains. In actions for a nuisance to a house, where the plaintiff asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter declares that the acts complained of are not a nuisance, a right beyond the mere right to recover damages comes in question, and the judge has power to certify.

An action may be brought to try a right, though nothing appears on the record to indicate such an intention. Wherever the plaintiff seeks to negative the right of the defendant to do the act of which he complains, the action may be brought to try a right beyond the mere question of damages (*m*). "Suppose," observes Tindal, C. J., "a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not by possibility come in question, still, if it should appear to the judge that the plaintiff had really intended to try a right, I conceive that the judge would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit, of the act" (*n*).

Wherever the record is so framed that a right beyond the mere right to recover damages *may* come in question, the court will not inquire whether or not the judge has exercised a sound discretion in granting a certificate. It is a matter entirely for the discretion of the judge, upon the effect of the evidence and the course taken at the trial (*o*).

Within what time the certificate must be granted under this statute.—The words "immediately afterwards," in s. 2 of the statute 3 & 4 Vict. c. 24, do not mean that the certificate is to be granted the very instant afterwards. "We interpret the words to mean," observes Lord Abinger, "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause." Where, therefore, the certificate was given by the judge after the jury had been dismissed, and the court adjourned, and the judge had retired to his lodgings in the town,

(*l*) *Tyler* v. *Bennett*, 5 Ad. & E. 377. *Macdougal* v. *Paterson*, 11 C. B. 755.
(*m*) *Shuttleworth* v. *Cocker*, 1 M. & Gr. 839; 2 Sc. N. R. 47.
(*n*) *Morison* v. *Salmon*, 2 M. & Gr. 304.
(*o*) Bosanquet, J., *Shuttleworth* v. *Cocker*, 1 M. & Gr. 837.

it was held that the certificate was well given (*p*). So where the under-sheriff, as presiding officer, on the execution of a writ of inquiry, on being asked for a certificate, said he would take time to consider, and adjourned the court, and subsequently in the evening of the same day gave a certificate, it was held that the time taken by the under-sheriff to consider his judgment was perfectly reasonable. "I do not," observes Lord Abinger, "limit the reasonable time to the interval before the trial of another cause, or even necessarily to the same day" (*q*). But whenever the under-sheriff certifies, the certificate must be given before the return of the writ of inquiry (*r*).

Where, on an application for a certificate under the statute 3 & 4 Vict. c. 24, the judge said that he would certify, if necessary, that the right came in question, and made a memorandum to that effect on his notes, it was held that a certificate subsequently indorsed on the record, had the same effect as if it had been indorsed at the trial (*s*). When the certificate is to be granted "forthwith," and the judge takes time to consider before he grants it, and the defendant does not object, he must be taken to assent to the course pursued by the judge (*t*).

Certificate to deprive a plaintiff of his costs in the superior courts.—By 23 & 24 Vict. c. 126, s. 34, it is enacted, that when the plaintiff in any action for an alleged wrong in any of the superior courts, recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was not really brought to try a right, besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought. The whole purview of this section is directed to those causes of action where damages, and damages only, are sought to be recovered. Cases where the plaintiff seeks to recover something more than mere damages are not within this section. Where, therefore, a party by his action seeks to recover some chattel wrongfully detained from him, and not merely damages for the wrongful detention, the judge has no power to grant the certificate. In an action of detinue, for example, the judge cannot grant the certificate (*u*); nor can he in such an action certify under 43 Eliz. c. 6,

(*p*) *Thompson* v. *Gibson*, 8 M. & W. 287.
(*q*) *Page* v. *Pearce*, 8 M. & W. 679.
(*r*) *Knapman* v. *Pryer*, 1 H. & N. 721.
(*s*) *Jones* v. *Williams*, 13 M. & W. 423.
(*t*) *Heden* v. *Atl. Mail, &c. Co.*, 29 Law J., Q. B. 191.
(*u*) *Danby* v. *Lamb*, 11 C. B., N. S. 426; 31 Law J., C. P. 17.

s. 2 (ante, p. 919), as the action of detinue is in form an action *ex contractu*, though the gist of the action is the wrongful detainer (*x*).

All these three things must be certified by the judge in order to deprive a plaintiff of his costs, *i. e.* first, that the action was not brought to try a right; secondly, that the trespass or grievance was not wilful or malicious; thirdly, that the action was not fit to be brought. If, therefore, the judge is unable to certify any one of these three particulars, his certificate is of no avail (*y*). But it is not necessary for the judge to certify that the trespass or grievance was wilful and malicious, for if the trespass was not both wilful and malicious, the plaintiff may be deprived of costs (*z*).

County Court Acts depriving the plaintiff of costs in the superior courts.— By the County Courts Act, 13 & 14 Vict. c. 61, s. 11, it is enacted, that if in any action commenced in her Majesty's superior courts of record in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.* (*a*); or if, in any action in trespass, trover, or case, not being an action for malicious prosecution, or for libel, slander, or seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in certain cases thereinafter provided, and except in the case of a judgment by default, in an action *ex delicto* (post, p. 925), and that it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court, or otherwise. It is then provided (s. 12) that if the plaintiff in any such action shall recover less than the sum thereinbefore mentioned by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in such county court, or that it appeared to him at the trial that there was a sufficient reason for bringing the action in the court in which it was brought, the plaintiff shall have the same judgment to recover his costs that he would have had if the act had not been passed. Section 13 of this statute further required the court or a judge at chambers to make an order for costs in cases where it was shown that the action was one of the excepted actions; but this section has been repealed by 15 & 16 Vict. c. 54, s. 4, whereby it is enacted, that in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the stat. 13 & 14 Vict. c. 61, whether there be a

(*x*) *Danby* v. *Lamb*, ante, p. 923.
(*y*) *Gooding* v. *Britnall*, 11 C. B., N. S. 148; 31 Law J., C. P. 5.
(*z*) *Saunders* v. *Kirwan*, 10 C. B., N. S. 514; 30 Law J., C. P. 351.
(*a*) *Beard* v. *Perry*, post, 925.

verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by 9 & 10 Vict. c. 95, s. 128 (post, p. 927), or for which no plaint could have been entered in any such county court, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing the action in the court in which it is brought, the court or the judge at chambers shall thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the act had not been passed (*b*).

When there is judgment by default.— By the County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 30, it is further enacted, that where an action of contract is brought in a superior court to recover a sum not exceeding 20*l.*, and the defendant suffers judgment by default, the plaintiff shall recover no costs, unless the court or judge shall otherwise direct (*c*).

When the foundation of the action is a contract, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must, if the action is not an excepted action (post, p. 928), recover more than 20*l.*, or obtain a certificate, rule, or order, in order to entitle himself to costs in the superior courts (*d*); and if in such an action the defendant pays into court a sum of money not exceeding 20*l.*, and the plaintiff accepts it in satisfaction of the cause of action, he cannot get any costs, as he has not recovered more than 20*l.* (*e*). So if the plaintiff proves a debt for 20*l.*, and the defendant proves a set-off for a less amount, leaving a balance of less than 20*l.*, which the plaintiff recovers, he is deprived of costs, as he recovers less than 20*l.*, although he proves a debt exceeding that amount (*f*). What the legislature meant by the word "'recover' was what the plaintiff is to get and put into his pocket" (*g*).

Where an action is brought against a common carrier for breach of the common-law duty to carry safely (ante, p. 392), the action is not founded on contract, but is an action *ex delicto* for negligence. It is an action on the case, and, therefore, if the plaintiff recovers more than 5*l.*, he is entitled to his costs (*h*).

(*b*) *Howlett* v. *Tarte*, 11 C. B., N. S. 634.
(*c*) *Baddolet* v. *Vernon*, 5 L. T. R., N. S. 287.
(*d*) *Legge* v. *Tucker*, 1 H. & N. 500; 26 Law J., Exch. 71.
(*e*) *Boulding* v. *Tyler*, 32 Law J., Q. B. 85. *Parr* v. *Lillicrap*, ib. Exch. 151, overruling *Chambers* v. *Wiles*, 24 Law J., Q. B. 267.
(*f*) *Beard* v. *Perry*, 2 B. & S. 493; 31 Law J., Q. B. 180. *Ashcroft* v. *Foulkes*, 18 C. B. 261, overruling, on this point, *Tonge* v. *Chadwick*, 5 Ell. & Bl. 950.
(*g*) *Gowens* v. *Moore*, 3 H. & N. 540.
(*h*) *Tattan* v. *Gt. West. Rail. Co.*, 29 Law J., Q. B. 184.

Where the plaintiff in the first count of his declaration complained of an assault, and in the second count for slander, and recovered 5*l.* damages on the first count, but failed on the second, it was held that he was entitled to no costs without a certificate or judge's order (*i*).

The prohibition as regards costs applies to issues of law as well as of fact, so that if in an action of tort there be an issue of fact and an issue in law, both of which are determined in favour of the plaintiff, but the damages recovered are less than 5*l.*, the plaintiff is wholly deprived of costs, unless he obtains an order or a certificate, or shows the action to be an excepted action (*k*).

The cases in which the plaintiff is entitled to a certificate on the back of the record, under 13 & 14 Vict. c. 61, s. 12, giving him a right to judgment for his costs, are, as we have seen (ante, p. 924), those where he shows to the satisfaction of the judge, or other presiding officer at the trial, that the cause of action was one for which a plaint could not have been entered in the county court, or that there was sufficient reason for bringing the action in the superior court. A judge may, under this statute, certify for costs at any time (*l*); but the under-sheriff, or presiding officer on a writ of trial, must, as we have seen (ante, p. 923), certify before the writ is returned. If it appears at the trial that the cause of action was one for which a plaint could not have been entered in the county court, it is the duty of the judge or presiding officer to certify to that effect, and not a matter of discretion with him whether he will or will not certify (*m*).

The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court, on the other hand, is very much a matter of discretion with the judge. There is no rule to guide him, but he must form his own opinion from the materials before him at the trial, and the court will not in general review his decision, and constitute themselves a court of appeal from his judgment (*n*). The certificate, when granted, does not in anywise modify or control s. 2 of the stat. 3 & 4 Vict. c. 24 (ante, p. 922), for the discouragement of trifling and vexatious suits. Therefore, if such a certificate be obtained in a case where a less sum than 40*s.* is recovered in an action for a wrong, the plaintiff cannot get his costs without the further certificate that the action was brought to try a right, or that the grievance was wilful and malicious (*o*).

The cases in which the plaintiff is entitled to a rule or order for his costs,

(*i*) *Smith* v. *Harnor*, 3 C. B., N. S. 829.

(*k*) *Dunston* v. *Paterson*, 5 C. B., N. S. 279. *Abley* v. *Dale*, 11 C. B. 893.

(*l*) Martin, B., *Mason* v. *Tucker*, 4 H. & N. 538. *Bennett* v. *Thompson*, 6 Ell. & Bl. 683; 25 Law J., Q. B. 378.

(*m*) *Macdougall* v. *Paterson*, 11 C. B. 773. *Leader* v. *Rhys*, 10 C. B., N. S. 369.

(*n*) *Hatch* v. *Lewis*, 7 H. & N. 367; 31 Law J., Exch. 26. *Dimsdale* v. *Lond. Br. & S. C. Rail. Co.*, 11 W. R., Q. B. 729.

(*o*) *Powle* v. *Gandy*, 7 C. B., N. S. 556; ante, p. 922.

under 15 & 16 Vict. c. 54, s. 4, are those where it is made to appear that the action was brought for a cause for which no plaint could have been entered in the county court, or that the action was removed by certiorari, or that there was sufficient reason for bringing the action in the superior court. If either of the two first events or circumstances are made out, it is, as we have seen, the duty of the court or judge to make the rule or order for costs, however insignificant may be the sum recovered (*p*); but if the plaintiff recovers no more than 40*s.* he can have no costs, or no more costs than damages under the rule or order, unless the requisites necessary for costs, or full costs, under the statutes for the prevention of frivolous and vexatious actions and suits, exist in the particular action; for the rule or order only gives the plaintiff the same right to costs that he would have had under those statutes, but for the passing of the County Court Acts (*q*).

If a plaintiff applies for costs to a judge in chambers, under s. 4 of this statute, the plaintiff cannot come for costs to the full court, except by way of appeal from the judge's decision, and the application must be made without any unreasonable delay (*r*).

Where an action was brought in a superior court for the detention of goods exceeding the value of 50*l.*, and the goods were returned to, and taken back by, the defendant after action, and the plaintiff went on with the action to recover further damages, and his costs, and obtained a verdict for a shilling damages, but the jury found that the value of the goods detained exceeded 50*l.*, it was held that the plaintiff was entitled to judgment for his costs, as no plaint would lie in the county court for goods of the value assessed (*s*). But where an action of trover was brought for the conversion of a portmanteau of the value of 25*l.*, and the portmanteau was delivered up to the plaintiff, and received back by him in court, and the jury then gave a verdict for 40*s.* damages, and the plaintiff failed to take a verdict for the value of the portmanteau, it was held that an order for costs could not be made, as a plaint could have been entered in the county court, and no sufficient reason was shown for bringing the action in the superior court (*t*).

The cases in which the plaintiff is entitled to costs under 9 & 10 Vict. c. 95, s. 128, are, first, where the plaintiff dwells more than twenty miles from the defendant; secondly, where the cause of action did not arise wholly (*u*), or in some material point (*x*), within the jurisdiction of the

(*p*) *Macdougall* v. *Paterson*, ante, p. 926. *Webb* v. *Sanderson*, 2 N. R. (1833), 331.

(*q*) *Evans* v. *Rees*, 30 Law J., C. P. 18. *Powle* v. *Gandy*, ante, p. 926.

(*r*) *Warman* v. *Halahan*, 30 Law J., Q. B. 48.

(*s*) *Leader* v. *Rhys*, 10 C. B., N. S. 369; 30 Law J., C. P. 345. *Taylor* v. *Addyman*, 13 C. B. 309; 22 Law J., C. P. 94.

(*t*) *Dimsdale* v. *Lond. & Br. Rail. Co.*, 11 W. R., Q. B. 720.

(*u*) *Aris* v. *Orchard*, 6 H. & N. 163.

(*x*) *Bonsey* v. *Wordsworth*, 18 C. B. 325. *Norman* v. *Marchant*, 7 Exch. 723.

court within which the defendant dwells, or carries on his business at the time of action brought (*y*); thirdly, where any officer of the county court is a party, except in respect of a claim to goods and chattels taken in execution of the process of the court, or to the proceeds or value thereof. If the plaintiff at the time of the commencement of the action dwells more than twenty miles from the defendant (*z*), the action is an excepted action, and the plaintiff is entitled to his costs, although he may have another residence within the prescribed limits, and may be dwelling there at the time of the trial (*a*). And where one of several plaintiffs resides more than twenty miles from the defendant, or one of several defendants resides more than twenty miles from the plaintiff, the action is an excepted action (*b*). A commercial company established in the metropolis, and carrying on business there, does not also carry on business in a country town within the meaning of sect. 128 of the County Courts Act merely by employing an agent there, and transacting business there in the name of such agent, and not in their own names (*c*). A corporation or public company carries on business, as we have seen, at its principal place of business, and not at its subordinate stations and offices (*d*).

What is a material part of the cause of action.—Where the items of a plaintiff's bill, or particulars of demand, are so connected together as to form one cause of action, and any one item arises within the jurisdiction of a county court within which the defendant dwells, or carries on his business at the time of action brought, and the parties do not dwell more than twenty miles apart, the cause of action in "some material point" arises within the jurisdiction of the county court, and the plaintiff is deprived of costs unless he recovers the requisite amount (*e*). And the several items of a claim may be consecutive so as to form one cause of action, although they are separated from each other by a considerable interval of time (*f*).

The cases in which the plaintiff is deprived of costs in the superior courts by the London Small Debts Act (*g*), are the same as those already specified in the County Court Acts, 13 & 14 Vict. c. 61, ss. 11, 12, and 15 & 16 Vict. c. 54, s. 4.

Costs on references — Where an action has been referred by agreement

(*y*) *Corbett* v. *Gen. St. Nav. Co.*, 4 H. & N. 482; 28 Law J., Exch. 214.

(*z*) By straight-line measurement. *Lake* v. *Butler*, 5 Ell. & Bl. 92. As to dwelling in a gaol by compulsion, see *Dunston* v. *Paterson*, 4 C. B., N. S. 267.

(*a*) *Butler* v. *Ablewhite*, 28 Law J., C. P. 293; 6 C. B., N. S. 740, overruling *Bailey* v. *Bryant*, 28 Law J., Q. B. 86. And see *Kerr* v. *Haynes*, 29 Law J., Q. B. 70.

(*b*) *Hickie* v. *Salamo*, 8 Exch. 62.

(*c*) *Corbett* v. *Gen. St. Nav. Co.*, 4 H. & N. 482. *Minor* v. *Lond. & N. W. Rail. Co.*, 1 C. B., N. S. 331.

(*d*) *Adams* v. *Gt. West. Rail. Co.*, *Shiels* v. *Gt. Northern Rail. Co.*, ante, p. 844.

(*e*) *Wood* v. *Perry*, 3 Exch. 442.

(*f*) *Copeman* v. *Hart*, 14 C. B., N. S. 735.

(*g*) 15 Vict. c. lxxvii. ss. 119–122, local and personal.

before trial, on the terms that the costs are to abide the event, the agreement regulates the right to costs, so that if the event is found in favour of the plaintiff, he is entitled to his costs whatever may be the amount recovered, for such a case is not within any of the statutes taking away the plaintiff's right to costs (*h*). The same rule has been held to prevail where the cause has been referred before trial, and the costs are, by order of a judge, or by order of *nisi prius*, made with the consent of the parties to abide the event (*i*). But when the cause has been referred after trial, and after a verdict has been taken, subject to a reference, the plaintiff cannot obtain judgment for his costs, unless he recovers through the instrumentality of the award and the verdict a sufficient sum to carry costs (*j*). In the case of a compulsory order of reference, in the common form, made under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by which the costs of the cause are to abide the event, if the plaintiff recovers less than 20*l*., he is not entitled to his costs without a rule or order for them (*k*).

Whenever the costs are to abide the event, and the plaintiff succeeds as to a very small part of the claim for which he brings his action, and fails as to the greater part of it, he is not entitled, as against the defendant, to the costs of the reference, for the event, in such a case, is substantially in favour of the defendant (*l*).

Where an umpire, on a reference, orders one party to pay the costs of the reference, not fixing the amount, the award is perfectly valid, and the party to whom the costs are directed to be paid may commence an action for the recovery of them without having the amount settled beforehand by the master on taxation, for when the party entitled to the costs sends in his claim to the other side, there is an ascertained debt due in respect of which a right of action exists. It is liquidated in this sense, that it can at any time be settled in amount by going before the taxing officer, who, when the submission has been made a rule of court, has authority between the parties to settle the amount due (*m*).

Certificate for full costs in cases of wilful and malicious trespass.— By 8 and 9 Wm. 3, c. 11, s. 4, it is further enacted, that in all actions of trespass in any of her Majesty's Courts of Record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge under

(*h*) *Frean* v. *Sargent*, 2 H. & C.; 32 Law J., Exch. 281.

(*i*) *Wigens* v. *Cook*, 6 C. B., N. S. 784. *Jones* v. *Jones*, 7 ib. 832. "But, in my opinion," observes Bramwell, B., "there ought to be no distinction between submissions to a reference by consent and compulsory submissions." *Smith* v. *Edge*, post.

(*j*) *Smith* v. *Edge*, 2 H. & C.; 3 N. R. (1863), 158; 33 Law J., Exch. 9.

(*k*) *Robertson* v. *Sterne*, 13 C. B., N. S. 248.

(*l*) *Kelcey* v. *Stupples*, 32 Law J., Exch. 6; 9 Jur. N. S. 256.

(*m*) *Holdsworth* v. *Wilson*, 32 Law J., Q. B. 289, overruling, on this point, *Holdsworth* v. *Barsham*, 30 ib. 145; 2 B. & S. 480.

his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages but his full costs of suit. And the statute 3 & 4 Vict. c. 24, s. 2, depriving plaintiffs in the superior and palatine courts of their costs, if they recover by the verdict of a jury less than 40*s.*, excepts cases in which the judge or presiding officer (ante, p. 920) immediately afterwards certifies on the back of the record, &c., that the trespass or grievance in respect of which the action was brought was wilful and malicious (*n*). A trespass which is committed after notice may fairly be deemed to be a wilful and malicious trespass. Originally the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice, but it is now held that the judge has a discretion in the matter; but the discretion will generally be exercised in favour of the plaintiff when notice has been given. Where the defendant went to the plaintiff's house to make a seizure under process from the county court, and being refused admittance he unlawfully broke open the outer door of the plaintiff's house with an axe, after a warning not to do so, and the jury gave only 40*s.* damages, the judge certified that the trespass was wilful and malicious, so as to give the plaintiff his full costs (*o*).

What amounts to a wilful and malicious trespass.—If a man inadvertently walk across another person's close, and the latter bring an action, the action would be frivolous, and the judge ought not to certify. But if the walking across the close be proved to have been done audaciously, and with a view of annoying the owner or his family, then the judge would be justified in granting the plaintiff a certificate that the trespass was wilful and malicious (*p*).

Full costs in actions of trespass, after notice not to trespass.—By 3 & 4 Vict. c. 24 (ante, pp. 920, 921), it is further enacted (s. 3), that nothing therein contained shall deprive any plaintiff of costs in any actions brought for a trespass over lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, out-buildings, or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served by or on behalf of the owner or occupier of the land trespassed over or upon, or left at the last reputed or known place of abode of the defendant or defendants in such action. The plaintiff, therefore, is entitled as of right to his full costs in an action for a trespass committed after notice, though he recover less than 40*s.* damages, and though the judge has refused to certify. The proper course for the plaintiff to adopt to entitle himself to costs is by enter-

(*n*) Parke, B., *Sherwin* v. *Swindall*, 12 M. & W. 789.

(*o*) *Sherwin* v. *Swindall*, 12 M. & W. 783.

(*p*) *Shuttleworth* v. *Cocker*, 1 M. & Gr. 836.

ing a suggestion on the record, to the effect that the trespass was committed after notice, leaving the defendant to traverse the suggestion if so advised (*q*). If the defendant has a right of way over the plaintiff's land, a general notice not to trespass will not entitle the plaintiff to his costs. The notice should be framed so as to warn the defendant not to deviate from the way. "The plaintiff," observes Patteson, J., "should say in effect, It is true you have a right of way over a particular part of the close, but you are to take care that you do not go out of that way. Here he has given a notice not to come upon the close at all" (*r*).

Certificate for full costs in actions for wilful and malicious grievances.— Whenever the judge certifies that the grievance for which the action was brought was wilful and malicious, the plaintiff is entitled to his costs. This has been held to be the case in an action for libel, where the plaintiff recovered a farthing damages, and the judge certified that the grievance was wilful and malicious (*s*).

Costs in the superior courts in actions against justices.— By 11 & 12 Vict. c. 44, s. 13, it is enacted, as we have seen (ante, p. 644), that where the plaintiff in an action against a justice of the peace for anything done by him in the execution of his office is entitled to recover damages, he is in certain cases entitled to no costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay a sum of money he was ordered to pay, and that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was ordered to pay. By s. 14 of this statute it is further enacted, that if the plaintiff recovers a verdict, or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs as if the act had not been passed; or if, in such case, it be stated in the declaration, or in the summons and particulars in a county-court action, that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and that in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict, or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client.

The statute 24 Geo. 2, c. 44, s. 6, enacts, as we have seen, that the constable or officer executing a justice's warrant shall, in a certain event, be sued only in conjunction with the justice or justices who executed the

(*q*) *Bowyer* v. *Cook*, 4 C. B. 236.
(*r*) *Bourne* v. *Alcock*, 4 Q. B. 625.
(*s*) *Foster* v. *Pointer*, 9 C. & P. 721; 8 M. & W. 398.

warrant, and that the jury on proof of the warrant shall find for the constable (ante, p. 630); and as regards the costs it is enacted, that if the verdict be given against the justice, the plaintiff shall recover his costs, to be taxed so as to include the costs the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers, such as those contained in the stat. 1 & 2 Wm. 4, c. 41, the plaintiff, though he obtains a verdict, cannot (s. 19) recover any costs from the defendant unless the judge before whom the trial takes place certifies his approbation of the action and of the verdict; and generally when an action is brought against a constable or a police-officer, or against private individuals, for anything done in pursuance of an act of parliament, or with the *bonâ-fide* intention of executing the provisions of some particular statute, and a verdict passes for the defendant, or the plaintiff becomes nonsuit or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant is entitled to recover his full costs as between attorney and client, and has the like remedy for the same as any defendant has in ordinary cases (*t*).

Certificate for costs in actions for things done in supposed pursuance of the Malicious Trespass Act.— By the protecting clause of the Malicious Trespass Act (7 & 8 Geo. 4, c. 30, s. 41), it is enacted, that though a verdict shall be given for the plaintiff in an action against any person for anything done in pursuance of the act (ante, p. 501), such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon. If, therefore, the judge does not at the trial give a certificate of approbation in conformity with the statute, the defendant is entitled to a suggestion of the fact on the record, in order to deprive the plaintiff of costs which he would otherwise recover (*u*).

Costs in actions against executors.— By 3 & 4 Wm. 4, c. 42, s. 31, it is enacted, that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner (*x*).

(*t*) See 5 & 6 Wm. 4, c. 76, s. 113; 1 & 2 Wm. 4, c. 41, s. 19.

(*u*) *Norwood* v. *Pitt*, 5 H. & N. 801; 28 Law J., Exch. 212.

(*x*) As to costs in actions by and against executors, see Gray on Costs, 227–235.

Costs in actions for duties and penalties at the suit of the Crown. — By 26 & 17 Vict c. 107, s. 263, it is enacted, that in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under that act, or any act relating to the customs, the parties thereto shall be entitled to recover costs against each other, in the same manner as if such suits or proceedings were conducted and had between subject and subject.

In actions upon judgments, the plaintiff is not entitled to any costs of suit unless the court in which the action is brought, or some judge of the same court, makes an order for costs (*y*). But the statute in this respect applies only where the action is brought on the judgment alone. When, therefore, a declaration contained two counts, one on a judgment, and another on a separate and distinct cause of action, and the plaintiff succeeded on both counts, it was held that the case was not within the statute, and that the plaintiff was entitled to his full costs without any order (*z*). The power of the court to make the order is not taken away by 7 & 8 Vict. c. 96, s. 57 (*a*).

Costs on new trials. — If a new trial be granted without any mention of costs in the rule, the costs of the first trial will not be allowed to the successful party, though he succeed on the second (*b*).

In the case of a new trial granted by reason of the misdirection of the judge, in an action in the superior courts, the party who succeeds in obtaining the rule absolute gets no costs. And where the judgment of the court below is reversed in a court of error, inasmuch as the judgment is not given for the defendant, but merely that the plaintiff *nil capiat per breve*, the statutes which give costs to the successful party in actions brought in the superior courts do not apply (*c*).

In cases of appeals from the decision of a county-court judge, or judge of an inferior tribunal, it is entirely in the discretion of the court to make such order with respect to costs as it thinks fit. "The rule," observes Willes, J., "which will in future be adopted in this court, is, that the successful party, whether appellant or respondent, will be entitled to his costs, unless there are some special circumstances which take the case out of the general rule; for we do not think that there is, for the purpose of costs, any analogy between the case of a new trial obtained by reason of the misdirection of a judge in an action brought in one of the superior courts, and an appeal from a county court on the ground of misdirection" (*d*).

(*y*) 43 Geo. 3, c. 46, s. 4.

(*z*) *Jackson* v. *Everett*, 1 B. & S. 857; 31 Law J., Q. B. 59.

(*a*) *Dickinson* v. *Angell*, 32 ib. 183, dissenting from *Adams* v. *Ready*, 6 H. & N. 261.

(*b*) Reg. Gen. Hil. Term, 1853, R. 54; 1 Ell. & Bl. App. xii.

(*c*) *Schroder* v. *Ward*, 13 C. B., N. S. 410; 32 Law J., C. P. 150.

(*d*) *Schroder* v. *Ward*, ut sup., dissenting from *Gee* v. *Lanc. & York. Rail. Co.*, 6 H. & N. 221; 30 Law J., Exch. 11.

In the case of an appeal to the Privy Council from the decision of the judge of the Court of Admiralty, the Privy Council having reversed the decision, gave the appellant not only his costs of appeal, but also the costs in the court below, saying that the unsuccessful party must take the consequences of bringing an action which he could not sustain (*e*).

In the case of an appeal from a superior court to the Court of Exchequer Chamber.—The general rule is, that costs follow the affirmance of the judgment below; but when the court is equally divided there can be no judgment for costs (*f*).

Costs on removal of actions by writ of certiorari.—When an action *ex contractu* is removed by certiorari (ante, p. 551), the plaintiff is not bound to follow the action into the superior courts. If, therefore, the plaintiff fails to proceed, the defendant has no means of getting judgment for his costs (*g*). If, however, the plaintiff proceeds with the action so removed and obtains a verdict, he will be entitled to his full costs, to be taxed on the higher scale, though he recovers less than 20*l.* (*h*).

In cases of prohibition, a plaintiff for whom a verdict is given by the jury is not entitled to recover the costs of the proceedings in the court below as damages under the statute 1 Wm. 4, c. 21, s. 1 (*i*).

On indictments for libel and slander, preferred by a private prosecutor, if judgment is given for the defendant, the defendant is entitled to his costs; but if there be a special plea of justification (ante, p. 735), and the issue thereon be found for the prosecutor, the latter will be entitled to recover from the defendant the costs he has sustained by reason of such plea (*k*).

Costs of writs of mandamus and injunction.—By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 32), it is enacted, that when a writ of mandamus or of injunction is issued under the provisions of the Common Law Procedure Act, 1854 (post, ch. 23), such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court.

On an application for an injunction under the Railway and Canal Traffic Act, costs will be awarded to the successful applicant, for the court will not without strong reason depart from the rule, that when a company has so acted as to make it proper for any person to come to the court for

(*e*) *Valentine* v. *Cleugh*, 8 Moo. P. C. C. 167; and see 7 ib. Appendix.
(*f*) *Archer* v. *James*, 2 B. & S. 61.
(*g*) *Garton* v. *Gt. West. Rail. Co.*, 28 Law J., Q. B. 103.
(*h*) *Perry* v. *Bennett*, 14 C. B., N. S. 402.
(*i*) *White* v. *Steel*, 12 C. B., N. S. 383; 32 Law J., C. P. 1.
(*k*) 6 & 7 Vict. c. 96, s. 8.

relief under the statute, that relief ought to be obtained at the costs of those whose acts have occasioned the application (*l*).

Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.—By the statute 5 & 6 Vict. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local and personal act, or in any act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered, and no more. And (s. 2) that so much of any enactment in any public act, not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf.

No double costs in error are to be allowed to either party (*m*).

Costs in compensation cases.—An offer of compensation by a railway company to a person whose land has been injuriously affected by the construction of a railway (ante, p. 661), must be made at least ten days before the holding of the inquisition of damages (ante, p. 664), in order to throw upon the party seeking compensation, and not obtaining more than the sum offered, the burthen of paying his own costs (*n*).

Taxation of costs.—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 223), the judges, or eight or more of them, with their chiefs, are empowered to make general rules and orders for fixing costs, apportioning costs of issues, and for enforcing uniformity of practice in the allowance of costs. "Costs are an indemnity; they are given to the person who receives them to indemnify him in respect of the cost of some proceeding which the other person has compelled him to take. They are not a punishment on the party who is to pay them, nor a bonus to the party who is to receive them. The principle, therefore, is to find out the extent of the damnification, and then you can find out the amount of costs you are to allow" (*o*). They ought to be a fair indemnity to the party, and if they are not so, the rules which govern the taxation of costs ought to be altered (*p*).

A plaintiff who has been kept attending as a material witness on his own cause may be allowed the expenses of his attendance, for the reason-

(*l*) *Baxendale, in re*, v. *Lond. & S. W.*, 12 C. B., N. S. 758.

(*m*) 5 & 6 Vict. c. 97, s. 2; 17 & 18 Vict. c. 125, s. 44. New Pleading Rules, Hil. Term, 1853, R. 69; 1 Ell. & Bl. App. xiv. *Cooper* v. *Slade*, 1 Ell. & Ell. 336. Gray on Costs, 181–186.

(*n*) *Metrop. Rail. Co.* v. *Turnham*, 2 N. R. (1863), p. 77; 8 & 9 Vict. c. 18, s. 61.

(*o*) Bramwell, B., *Harold* v. *Smith*, 5 H. & N. 381; 29 Law J., Exch. 141.

(*p*) Pollock, C. B., *Doe* v. *Filliter*, 13 M. & W. 51.

able expenses to which a plaintiff is put by being obliged to attend and be examined as a witness to seek redress for an injury should be thrown upon the wrong-doer (*q*). And if the plaintiff has been obliged to quit his vessel and abandon an intended voyage, and remain in England to give evidence, the reasonable and necessary expenses of his maintenance may be allowed him (*r*). And where the defendant's presence in court is reasonably necessary for his defence, the expense of his attendance will be allowed if the defence is successful (*s*).

When there are several defendants who defend jointly, and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defence, and to any additional costs that were reasonably necessary for his defence (*t*). If several defendants defend separately by separate attornies, and a verdict is given in favour of some or all of them, each successful defendant is entitled to the costs of his defence (*u*).

Where the jury, being unable to agree upon their verdict, are discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial (*x*).

The court is bound not to allow a successful party all the expense he may have thought proper to incur when it can see that part of it has been needless. Where there is matter ascertained in the cause, whether appearing upon the face of the proceedings or established by the statement of the judge, founded upon his judicial knowledge of the facts, whereby the master is satisfied that witnesses called by the successful party have been wholly useless, he ought to disallow the expenses of such evidence (*y*).

Costs of particular issues.—The costs of any issue, either of fact or of law, follow the finding or judgment upon such issue, and will be adjudged to the successful party, whatever may be the result of the other issues (*z*). But when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment; and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial will be allowed to the opposite party (*a*).

(*q*) *Howes* v. *Barber*, 18 Q. B. 588; 21 Law J., Q. B. 254.

(*r*) *Ansett* v. *Marshall*, 22 Law J., Q. B. 118.

(*s*) *Flower* v. *Gardner*, 3 C. B., N. S. 187; 27 Law J., C. P. 56.

(*t*) *Griffiths* v. *Kynaston*, 2 Tyr. 757. *Bartholomew* v. *Stephens*, 5 M. & W. 386. Gray on Costs, 96.

(*u*) *Newton* v. *Boodle*, 4 C. B. 359. *Gambrell* v. *Falmouth*, 5 Ad. & E. 403.

(*x*) *Wall* v. *Lond. & S. W. R. Co.*, 11 Exch. 696.

(*y*) *Reynolds* v. *Harris*, 3 C. B., N. S. 291; 28 Law J., C. P. 26.

(*z*) 15 & 16 Vict. c. 76, s. 81.

(*a*) Reg. Gen. Hil. Term, 16 Vict. No. 62; 1 Ell. & Bl. App. xiii. As to this, see Chitty's Arch. Pr. 463; and as to costs in general, see Scott's Costs in the Superior Courts of Common Law, &c.

The party who is entitled to the costs of the cause is entitled to the costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him, and the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded. Costs apart from costs in the cause are only given by the rule of court and the statute to a party succeeding upon an issue (*b*). It is for the master to ascertain whether any and what costs have been incurred as to part of the issue found for the defendant, and when they can be ascertained to have been incurred relative to that only, to tax them to the defendant, though the plaintiff has succeeded, and is entitled to the general costs of the cause (*c*).

Where a plea consists of several parts, the party succeeding on any one of those parts is entitled to have that part treated as if it were a separate plea raising a several issue (*d*).

If the action brought in the superior court is one of the excepted actions, such as an action brought by a plaintiff who resided more than twenty miles from the defendant at the time of the commencement of the action, and the plaintiff is nonsuited, the defendant is not entitled to have his costs taxed on the higher scale as between attorney and client; "for it is quite impossible to suppose, that while the 128th section gives the plaintiff the right to sue in the superior court, the legislature, by the 129th section, intended to subject him to costs as between attorney and client if he exercised that right" (*e*).

Where costs are to be taxed by the court in which the action is brought, under the provisions of certain acts of parliament, giving a defendant costs in certain cases where he would not otherwise be entitled to them, and the cause is removed by writ of certiorari from an inferior to a superior court, the superior court cannot give judgment for costs, as it is not the court in which the action was brought (*f*).

Security for costs. — When the plaintiff in the action is a foreigner, having no permanent place of abode in this country, the court will stay proceedings in the action until he has given security for costs to the satisfaction of the master (*g*). Where, also, a sham plaintiff, a pauper, is set up to sue for penalties for the benefit of others who keep in the background, the court may require him to give security for costs (*h*). If, also,

(*b*) *Reynolds* v. *Harris*, 3 C. B., N. S. 289.

(*c*) *Traherne* v. *Gardner*, 8 Ell. & Bl. 182. As to costs of abortive issues, 15 & 16 Vict. c. 76, s. 145, and the New Pr. Rules, Hil. Term, 1853, R. 63; 1 Ell. & Bl. App. xiii.

(*d*) *Davis* v. *Thomas*, 5 Jur. N. S. 709.

(*e*) Pollock, C. B., *Mason* v. *Tucker*, 4 H. & N. 537; 28 Law J., Exch. 271.

(*f*) *Connellan* v. *Watson*, 2 Dowl. P. C. 130. *Woodhall* v. *Voight*, 6 H. & N. 153; 30 Law J., Exch. 31. *Costello* v. *Corlett*, 4 Bing. 474.

(*g*) *Nylander* v. *Barnes*, 30 Law J., Exch. 150, overruling *Nelson* v. *Ogle*, 2 Taunt. 255. *Zychlinski* v. *Maltby*, 14 C. B., N. S. 322. *Chapple* v. *Watt*, 29 Law J., Q. B. 167.

(*h*) *Browne* v. *Redmond*, 11 Ir. C. L. R., App. 28. *Rice* v. *Dub. & Wick. Rail. Co.*, 8 ib. 155, C. P.

the plaintiff is residing abroad out of the jurisdiction of the court, he may be required to give security for costs (*i*). But an officer engaged in the service of the Crown in a foreign country cannot be required to give such security (*k*).

Where a limited liability company is plaintiff, it may be required to give security for costs if it be shown that there is reason to believe that the assets of the company will not suffice to pay the defendant his costs, in case he is successful, and proceedings may be stayed until such security is given (*l*).

Award of costs in the county court.— By 9 & 10 Vict. c. 95, s. 88, it is enacted, that all the costs of any action or proceeding in the county court, not therein otherwise provided for, shall be paid by or apportioned between the parties, in such manner as the judge shall think fit, and in default of any special direction shall abide the event of the action.

(*i*) *Holmes* v. *Pemberton*, 28 Law J., Q. B. 172.

(*k*) *Whittall* v. *Campbell*, 5 H. & N. 601.

(*l*) 20 & 21 Vict. c. 14, s. 24. *Cailland's Pat. Tan. Co.* v. *Cailland*, 28 Law J., Ch. 357.

CHAPTER XXIII.

OF DAMAGES IN CHANCERY, AND THE REMEDY BY INJUNCTION, PROHIBITION, AND CERTIORARI.

SECTION I. — *Damages in courts of equity.* Award of damages in Chancery — The writ of injunction to prevent or restrain the commission or continuance of wrongful acts — Injunction to restrain a public company from exceeding its statutory powers, to prevent disturbance of grave-yards and obstructions to rights of burial, to restrain the infringement of patent rights and copyright, and the sale or detention of chattels — Effect of delay in applying for the writ — Acquiescence precluding the plaintiff from relief — Trial of questions of law and fact in the courts of Chancery — Remedy by injunction at common law — Injunction at common law to restrain infringements of patent right and copyright — Injunctions and orders to stay proceedings.

SECTION II. — *Of the remedy by prohibition for the prevention of judicial wrongs.* — The writ of prohibition — Prohibition before and after judgment and execution — Prohibition where appeal lies — Principle on which the writ goes to the spiritual courts — Prohibition notwithstanding an appeal — Writ of prohibition to restrain a county-court judge — Prohibition to the Lord Mayor's court — Proceedings in prohibition — Rule to show cause — Notice of the issue of the writ — Refusal of writ when final — Of setting aside prohibitions issuing out of Chancery.

SECTION III. — *Of the remedy by certiorari.* — The writ of certiorari — Where the inferior court has jurisdiction — Where the inferior court has no jurisdiction — Grounds for the issue of the writ — Upon an inquisition of damages before the sheriff — Certiorari to remove causes from the county court — Of the concurrent remedy by appeal and by certiorari — Application for the writ — Affidavits when necessary — Notice and effect of the issue of the writ — Refusal of the writ — Proceedings after removal — Quashing of the writ — Procedendo.

SECTION I.

OF DAMAGES IN CHANCERY AND THE REMEDY BY INJUNCTION.

Award of damages in the Court of Chancery. — By the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), it is enacted (s. 3), that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any

wrongful act, it shall be lawful for the court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction, and such damages may be assessed in such manner as the court shall direct (*a*). The meaning of the statute is, that where the court has jurisdiction in the suit, it may award damages in substitution for specific performance (*b*). Damages independent of relief in the Court of Chancery will not be given, for the statute, it has been observed, was never intended to transfer the jurisdiction in a simple case of damages from a court of common law to a court of equity (*c*), and throw upon a court of equity the functions which properly belong to a jury (*d*).

The writ of injunction issuing out of Chancery is, as we have seen (ante, p. 59), a prohibitory writ granted at the discretion of the court, restraining a defendant from the repetition or continuance of a wrongful act; and enforceable, in case of disobedience, by attachment (*e*). The object of the equitable interference by injunction, is to prevent the infringement or disturbance of a clear legal right (*f*), or for the purpose of better enforcing legal rights, or preventing mischief until they have been ascertained (*g*).

Various instances of the granting of this writ for the protection and preservation of legal rights have been already given in the case of injunctions to prevent the disturbance of rights incident to the possession and ownership of land (ante, pp. 59–61), easements and profits *à prendre* (ante, pp. 130, 131), for the prevention of brick-burning (*h*) and nuisances (ante, pp. 179–182), for the prevention of waste (ante, pp. 216–219), for the prevention of trespasses (ante, pp. 265, 266), to enforce compliance by railway and canal companies with the provisions of the Railway and Canal Traffic Act (ante, pp. 431, 432), to restrain public companies from doing acts *ultra vires* (ante, pp. 677, 678), and to prevent and repress fraud and the fraudulent use of trade-marks (ante, pp. 774–776 (*i*).

The interference of the court is not, as we have seen, confined to the prevention of the continuance of an injury already done, but its assistance may be invoked for the purpose of averting a threatened mischief (*j*). The court will not interfere for the protection of public rights, unless it is

(*a*) *Mold* v. *Wheatcroft*, 30 Law J., Ch. 598.

(*b*) *Soames* v. *Edge*, Johns. 669.

(*c*) *Howe* v. *Hunt*, 32 Law J., Ch. 36. *Chinnock* v. *Sainsbury*, 30 ib. 409.

(*d*) *Rogers* v. *Challis*, 27 Beav. 175; 29 Law J., Ch. 240.

(*e*) Drewry on Injunctions, Goldsmith's Eq. Pr.

(*f*) *Herr* v. *Un. Bank*, 2 Giff. 686.

(*g*) *Saunders* v. *Smith*, 3 Myl. & Cr. 729.

(*h*) *Beardmore* v. *Tredwell*, 7 L. T. R., N. S. 207.

(*i*) As to infringements of right of access to a public river, *Fishmongers' Co., ex parte*, 11 W. R. Ch. 103; 8 Jur. N. S. 1203.

(*j*) Ante, pp. 60, 265. *Tinkler* v. *Wandsworth District Board*, 2 De G. & J. 272. *Gibson* v. *Smith*, 2 Atk. 182.

satisfied that the interests of the public require the issue of the injunction (*k*).

Injunction to restrain a public company from exceeding its statutory powers, will be granted at the suit of a private person who has sustained some private individual injury thereby, but not, as we have seen, at the instance of a rival company, or any public body not qualified to represent the interests of the public (*l*).

Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial. — If a person takes a mortgage of the ground of a cemetery belonging to a company, and the company continues after the mortgage to grant permanent rights of burial, and persons are buried in the mortgaged land with the knowledge of the mortgagee, the Court of Chancery will, by injunction, restrain the latter from disturbing the ground and interfering with the graves and the right of burial. The act to amend the laws concerning the burial of the dead in the metropolis (15 & 16 Vict. c. 85), putting an end to the general right of burial therein, specially reserves permission for particular individuals having private rights to bury in the grounds which are within the provisions of the act, provided they previously obtain the sanction of one of Her Majesty's principal secretaries of state for the time being, for the purpose. The legislature, therefore, has in a qualified manner preserved these rights, and the interference of the court may be obtained for their protection against the acts of wrong-doers who seek to interfere with the graves or the soil of the burying ground (*m*).

Injunction to restrain the infringement of patent rights and copyright. — If a plaintiff is in a position to support by proper evidence his title to a patent, and to prove the fact of its having been infringed, he is entitled to an injunction to stop the mischief (*n*). But it is not the practice of the courts of equity to grant a perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established (*o*). We have seen that an injunction may be obtained to prevent persons attending lectures, from taking notes and publishing such lectures for profit, without the author's consent (*p*); also to restrain the publication of private letters without leave of the person

(*k*) *Felkin* v. *Ld. Herbert*, 9 W. R. 496. *Fishmongers' Co., ex parte*, 11 ib. 163. *Ryde Com.* v. *Isle of Wight Ferry Co.*, 30 Beav. 616. *Wandsworth Board, &c.* v. *Lond. & S. W.*, 8 Jur. N. S. 691. *Wintle* v. *Bristol & S. W. R. Co.*, 6 L. T. R., N. S. 20.

(*l*) Ante, pp. 181, 182. *Stockport Dis. Water Co.* v. *Manchester (Mayor, &c.)*, 11 W. R. 156. *Bostock* v. *North Staff. &c.*, ante, p. 677. *Tinkler* v. *Wandsworth, &c.*, ante, p. 678.

(*m*) *Morcland* v. *Richardson*, 26 Law J., Ch. 690; 25 ib. 883.

(*n*) *Gardner* v. *Broadbent*, 2 Jur. N. S. 1041. *Bacon* v. *Jones*, 4 Myl. & Cr. 433. As to the injunction at common law, see post, p. 944.

(*o*) *Hills* v. *Evans*, 31 Law J., Ch. 457. As to the legal validity of patent rights, see *Lang* v. *Gisborne*, ib. 771.

(*p*) *Abernethy* v. *Hutchinson*, ante, p. 10.

who wrote them, or, in case of his death, without the leave of his executor (*q*), and from printing and publishing any private manuscript or unpublished work, without the consent of the author or proprietor (*r*). If a party under the pretence of writing a criticism upon an author's work, copies out the most attractive parts of it, and so large a quantity of the text as to injure and interfere with the sale of the work, the author or proprietor is entitled to an injunction (*s*). But where the reviewer or critic takes no more than is reasonably sufficient for a mere review or critique, an injunction will be refused (*t*). A fair abridgement is in certain cases allowable, but not where it is merely colourable or evasive, and is so far a reproduction of the original work as to injure the sale of it (*u*).

An injunction may also be obtained to restrain an infringement of the statutory copyright in printed books, lectures, dramatic literary property and musical compositions, sculpture, useful and ornamental designs, prints and engravings, paintings, drawings, and photographs (*x*). It is maintainable by the grantee or assignee of a printed work, although he has not paid the author the price agreed upon for the writing of the work (*y*); but before the court will interfere in his favour, it must be shown that he has a good legal title to the copyright (*z*).

Injunction to restrain the sale or detention of chattels. — Where specific chattels necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, the court will interfere by injunction, and give the debtor an opportunity of redeeming his property (*a*).

Effect of lâches and delay in applying for an injunction. — The court, in the exercise of its discretion with regard to the granting of an injunction, will, as we have seen, be influenced by any *lâches* or delay which may have taken place in the institution of the proceedings (*b*). Long delay may amount to absolute proof of acquiescence in the act complained of, and will, if unexplained, certainly throw considerable doubt on the reality of the alleged injury (*c*).

Acquiescence precluding a plaintiff from relief. — A man who lies by while he sees another person expend his capital and bestow his labour upon any work which he claims to have a right to prevent, without giving

(*q*) *Thompson* v. *Stanhope*, Ambl. 737.

(*r*) *Queensbury (Duke of)* v. *Shebbeare*, ante, p. 9. *Prince Albert* v. *Strange*, ante, p. 10. *Macklin* v. *Richardson*, Ambl. 694; ante, pp. 9, 10.

(*s*) *Campbell* v. *Scott*, 11 Sim. 31. *Saunders* v. *Smith*, 3 Myl. & Cr. 711. *Bramwell* v. *Halcomb*, 3 ib. 737.

(*t*) *Bell* v. *Walker*, 1 Bro. Ch. C. 450.

(*u*) *Tonson* v. *Walker*, 3 Swanst. 672; ante, pp. 36–41.

(*x*) Ante, pp. 36–41.

(*y*) *Cox* v. *Cox*, 11 Hare, 118.

(*z*) *Stevens* v. *Benning*, 24 Law J., Ch. 153; ante, pp. 36–41. Addison on Contracts, pp. 125–128, 5th edn.

(*a*) *North* v. *Gt. Northern Rail. Co.*, 60; 29 Law J., Ch. 301.

(*b*) *Bridson* v. *Benecke*, 12 Beav. 1.

(*c*) Ante, pp. 180, 181, 219. *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 230. *Wicks* v. *Hunt*, 1 Johns. 372.

that person any notice or attempting to interrupt him, and who thus acquiesces in proceedings inconsistent with his own claims, will in vain ask for an injunction, the effect of which would be to render all the expense useless which he voluntarily suffered to be incurred (*d*). Where there was a parol agreement for the making of a watercourse through the defendant's land, for a certain consideration to be paid to the latter, and the watercourse was made and used for some time, and the parties could not afterwards agree upon the amount to be paid for the easement, and the defendant then stopped up the watercourse, an injunction was granted to restrain him from interfering with the plaintiff's use of it, and it was referred to the master to ascertain the amount that ought to be paid for the enjoyment of the privilege (*e*).

Of the statutory obligation upon the Court of Chancery to decide all questions of law and fact on the determination of which the title to relief in equity depends.— Formerly, when an injunction was granted for the protection of a legal right, and a question was raised as to the existence of the right, the court made the continuance of the injunction dependent upon an action being brought to try the right, or it required the complainant first to establish his title at law, and suspended the grant of the injunction until the result of the legal investigation had been ascertained (*f*); but the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 62, provides, that in cases where it is the practice of the court to decline to grant equitable relief until the legal title or right of the parties seeking such relief has been established in a proceeding at law, the court may itself determine such title or right without requiring the parties to proceed at law to establish the same; and the statute 21 & 22 Vict. c. 27, s. 3, provides for the trial of questions of fact arising in any suit or proceeding in Chancery, either before a common or special jury, or (s. 5) before the court itself without a jury. When the trial takes place before a jury, the court has the same powers, jurisdiction, and authority as any judge of any of the superior courts sitting at *nisi prius*.

And by 25 & 26 Vict. c. 42, s. 1, it is enacted, that in all cases in which any relief or remedy within the jurisdiction of the courts of Chancery is sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be, or be not, incident to, or dependent upon, a legal right, any question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same courts. But whenever it shall appear (s. 2) that any

(*d*) *Parrott* v. *Palmer*, ante, p. 219. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515. *Dann* v. *Spurrier*, *Cotching* v. *Bassett*, ante, pp. 180, 181.

(*e*) *Devonshire* (*Duke of*) v. *Elgin*, ante, p. 130.

(*f*) *Earl Ripon* v. *Hobart*, 3 Myl. & K. 177. *Clowes* v. *Beck*, 13 Beav. 354; 20 Law J., Ch. 505. *Bacon* v. *Jones*, 4 Mylne & Cr. 436.

question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues, the court may, nevertheless, direct any issue to try the question at the assizes, or at a sitting for the trial of issues in London or Middlesex.

All the provisions with reference to the trial of questions of fact by courts of Chancery, contained in the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27, ante, p. 939), apply to the determination of questions of fact under this act. But the court is not bound (s. 4) to grant relief in any matter respecting which a court of common law has concurrent jurisdiction, if it shall appear that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law.

This act of parliament renders it compulsory upon the courts of Chancery to decide the whole question brought before them, both as regards the legal title of the parties, and the claim to equitable relief. The act applies not merely to rights, but to remedies given by the courts of equity, and does away with the power of refusing or postponing remedies until the legal title has been established by a trial at law (*g*). But there is nothing in the act which authorises the court to transfer to itself an action actually pending in a court of law (*h*), or to take cognizance of wrongs, and interfere by injunction when the act complained of has been done, and the question whether the act is wrongful or not depends upon matters of fact and law, for the trial of which no tribunal is so fit as a jury having the assistance of a judge to direct them (*i*).

Of the remedy by injunction at common law. — By 17 & 18 Vict. c. 125, s. 79, it is enacted, that in all cases of injury where the party injured is entitled to maintain, and has brought, an action, such party may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a writ of injunction, and the plaintiff may thereupon claim a writ of injunction against the repetition or continuance of such injury, or the committal of any injury of a like kind; and he may also, in the same action, include a claim for damages, or other redress, and judgment may be given (s. 81) that the writ of injunction do or do not issue, as justice may require. In case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when the courts shall not be sitting, by a judge.

It is further provided (s. 82), that it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or *after judgment, to apply ex parte* to the court or a judge for a writ of injunction to restrain the defendant, in such action, from the repetition or

(*g*) *Hooper, in re*, 32 Law J., Ch. 55.
(*h*) *Curlewis* v. *Carter*, 3 N. R. (1863), 60.
(*i*) *Att.-Gen.* v. *United King. Tel. Co.*, 30 Beav. 287; 31 Law J., Ch. 329. *Dowling* v. *Beljemann*, 2 Johns. & H. 544.

continuance of the wrongful act, or the committal of any injury of a like kind, relating to the same property or right; and the writ may be granted or denied by the court, or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to the court or judge shall seem reasonable and just. In case of disobedience, the writ may be enforced by attachment by the court, or, when the court is not sitting, by a judge. But the order, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the court, on the application of any party dissatisfied with the order.

The court will, by injunction under this statute, compel a wrong-doer to pull down a building, or remove a wall obstructing ancient windows, and will, in certain cases, retain the writ in the office on the defendant undertaking to pull down so much of a building as may be necessary in the opinion of a surveyor, to be selected by the parties, or nominated by a judge, to restore to the plaintiff the full enjoyment of the light and air he previously possessed (*k*). The practice in equity is to direct an issue to try the right, and that an account be taken in the meantime, and to grant an interlocutory injunction until the cause is determined, and the courts of common law will mould their proceedings as nearly as possible in accordance with the proceedings in equity (*l*).

When once an injunction has been obtained under s. 82 of this statute, it is in itself a continuing injunction, and if it is disobeyed at any time the plaintiff may apply to the court, or, if the court be not sitting, to a judge, to enforce obedience to it by attachment (*m*).

The court has no power to grant an injunction in an action of ejectment (*n*).

Injunction at common law to restrain infringements of patent-right and copyright (*o*). — By the Patent Law Amendment Act (15 & 16 Vict. c. 83), s. 42, it is enacted, that in any action in the superior courts for the infringement of letters patent, it shall be lawful for the court in which the action is pending, or, if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant, to make an order for an injunction, &c.; and by 25 & 26 Vict. c. 68, s. 9, it is further enacted, that in any action for an infringement of copyright in paintings, drawings, and photographs, in the superior courts, the court in which the action is pending, or a judge of the court, if the court is not sitting, may make an order for an injunction (*p*).

Where the plaintiff, in the first count of his declaration, alleged that the defendant wrongfully took, and kept possession of, certain photo-

(*k*) *Jessel* v. *Chaplin*, 2 Jur. N. S. 931.
(*l*) *Gillins* v. *Symes*, 15 C. B. 362.
(*m*) *De La Rue* v. *Fortescue*, 2 H. & N. 324; 26 Law J., Exch. 339.
(*n*) *Baylis* v. *Le Gros*, 26 Law J., C. P. 176.
(*o*) As to injunction in equity, see ante, pp. 941, 942.
(*p*) 25 & 26 Vict. c. 68, s. 9.

graphic plates of the plaintiff for printing portraits, and printed and sold portraits therefrom, and thereby rendered the plates less valuable to the plaintiff, and deprived him of the profits he would have derived from printing and selling portraits himself from the said plates; and in a second count charged the defendant with detaining the said photographic plates, and claimed a return of them, or their value, and 10*l.* for their detention, and 1000*l.* in respect of the causes of action in the first count mentioned; and also claimed an injunction to restrain the defendant from continuing to print portraits from the said plates, it was held that the plaintiff was entitled to recover damages on both counts of his declaration, and was also entitled to an injunction (*q*).

Injunctions and orders to stay proceedings.—If any action, suit, or proceeding is commenced, or prosecuted, in disobedience of a writ of injunction, rule, or order from the superior courts, or a judge thereof, the proceeding will be utterly null and void, and the parties prosecuting it will be liable to an attachment (*r*). The court also will stay proceedings after order made, and before the writ of injunction is actually issued (*s*).

SECTION II.

OF THE REMEDY BY PROHIBITION FOR THE PREVENTION OF JUDICIAL WRONGS.

The writ of prohibition is a writ issuing out of Chancery, or one of the superior courts at Westminster, directed to the judge or officers of an inferior court, prohibiting them from intermeddling with, or executing, anything of which, by law, they ought not to take cognizance. The object of the writ is to enforce the due administration of justice by keeping all inferior courts within the limits and bounds of their several jurisdictions, as defined by the laws, customs, and statutes of the realm (*t*).

The writ was in ancient times in the hands of the judges, the great bulwark of the rights, liberties, and privileges of Englishmen against the usurpations of the ecclesiastical courts, and the inordinate pretensions of the clergy, who sought to arrogate to themselves the trial of the limits

(*q*) *Mayall* v. *Higby*, 31 Law J., Exch. 329; 1 H. & C. 148; ante, pp. 30–41.
(*r*) 15 & 16 Vict. c. 76, s. 226.
(*s*) *Corbett* v. *Ludlam*, 11 Exch. 450; 25 Law J., Exch. 25.
(*t*) Bac. Abr., PROHIBITION.

and bounds of parishes; the trial of the right to tythes and church-patronage; the right to distrain or attach within their fees; the right of the clergy to their temporal possessions and emoluments; the trial, also, of suits for libel and slander and of various matters of temporal and secular concern which had always been governed by the common law of the land, as administered by the king's courts, and not by the laws of the church and the clergy.

Canons and constitutions were framed by Archbishop Boniface (*u*) forbidding the interference of the king's courts of common law with the ecclesiastical courts, and the king's lands and revenues were laid under interdict, and excommunications were thundered out against the judges in case of disobedience of the clerical canons. "But," observes Lord Coke, "notwithstanding the greatness of the archbishop, and that divers judges of the realm were of the clergy, and all the great officers of the realm, as chancellor, treasurer, privy seal, &c., were prelates, yet the judges proceeded according to the laws of the realm, and still kept, though with great difficulty, the ecclesiastical courts within their just and proper limits."

At a much later period, after the Reformation, at a council holden by King James I. (*x*), Bancroft, archbishop of Canterbury, complained to the King of the issue of prohibitions to the ecclesiastical courts, and informed His Majesty that it was competent to him to take what causes he pleased from the determination of the judges, and determine them himself, and that such authority belonged to the king by the word of God in the Scripture; but Lord Chief Justice Coke, "in the presence, and with the clear consent, of all the judges of England and barons of the Exchequer," answered to His Majesty, that the king in his own person cannot adjudge any case, civil or criminal, but the same ought to be determined in a court of justice, according to the law and custom of England; and though the king may sit in the King's Bench, yet the court gives the judgment. "And the judges informed the King, that no king, after the Conquest, assumed to himself to give any judgment in any cause whatsoever; and it was greatly marvelled that the Archbishop durst inform the King that such absolute power and authority belonged to him by the word of God, when, according to the ancient law of the land, no man can be put to answer without presentment before the justices, matter of record, due process, or by writ original."

"Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the judges; to which it was answered by me," says the Chief Justice, "that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his

(*u*) A.D. 1258; 2 Instit. 598, 599. (*x*) Sunday, Nov. 10th. A.D. 1608.

realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law; which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden mete-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be *under* the law, which was TREASON to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et lege!*" (*y*).

The writ of prohibition, therefore, from the Queen's courts at Westminster still goes to the ecclesiastical courts, as well as to the courts of Admiralty, courts-martial, county courts, courts baron, the Vice-Chancellor's court, the court of the Earl Marshall, courts of quarter-sessions, municipal councils, and to all magistrates, sheriffs, commissioners, and persons acting in a judicial capacity, to restrain their proceedings when they are acting, or are about to act, in excess of their jurisdiction (*z*). It lies also in certain cases to restrain the proceedings of courts of criminal jurisdiction, and will be granted to prevent a coroner holding an inquest from extending his inquiries beyond the proper limits of his office (*a*).

When the act sought to be prohibited is not a judicial act, a prohibition will not lie (*b*); but all acts based upon a decision judicial in its nature, and affecting either a public or a private right, are judicial acts; such as an order by church-building commissioners to stop up a footpath through a churchyard (*c*); or the apportionment of a county-rate by commissioners (*d*); or an order of sessions regulating the fees of the clerk of the peace (*e*).

Prohibition before judgment.—Wherever the case is of such a nature as to show on the face of the proceedings a want of jurisdiction in the inferior court, it is the bounden duty of the superior court to issue the writ of prohibition, in whatever stage of the proceedings below that fact is made manifest, either by the Crown or by any one of its subjects. The misconstruction of an act of parliament by an inferior tribunal, whereby it is about to do something which it is not authorised to do, is one of these cases; the enforcement of a rate or tax imposed without lawful authority is another (*f*).

(*y*) *Prohibitions del Roy*, 12 Co. 63–64.

(*z*) Bac. Abr., PROHIBITION (I). *Birch, in re*, 15 C. B. 743. *Chabot, in re*, 17 Law J., Q. B. 336. *Church* v. *Inclos. Com.*, 31 Law J., C. P. 201.

(*a*) *Reg.* v. *Hereford*, 20 Law J., Q. B. 249.

(*b*) *Death, ex parte*, 18 Q. B. 647; 21 Law J., Q. B. 337. *Reg.* v. *Salford*, 18 Q. B. 687.

(*c*) *Reg.* v. *Arkwright*, 12 Q. B. 960.

(*d*) *Reg.* v. *Aberdare Canal Co.*, 14 Q. B. 854.

(*e*) *Reg.* v. *Coles*, 8 Q. B. 75.

(*f*) *Burder* v. *Veley*, 12 Ad. & E. 263. *Veley* v. *Burder*, ib. 311. *White* v. *Steel*, 13 C. B., N. S. 231; 31 Law J., C. P. 265. *Foster* v. *Foster*, 32 Law J., Q. B. 314.

When it appears from the very form of an information or plaint, and particulars of a cause of action in the inferior court, that the court has no jurisdiction in the matter, the party served with the process may at once apply for a prohibition, without entering any appearance, or taking any steps to defend himself in the court below (*g*), or he may appear and take the objection, and go for a prohibition, in case the judge rules against him. When the defect of jurisdiction is not made manifest at the commencement of the proceedings by the plaintiff himself, but depends upon certain questions of fact, the defendant may bring before the court the facts depriving it of jurisdiction, and object to any further proceeding in the matter, and go for a prohibition, if the judge comes to an erroneous decision upon the facts before him, and assumes to have jurisdiction when in point of law he has none (*h*).

Cases are to be met with where the courts have refused to grant writs of prohibition upon motion, where the question of the cause of action having arisen within or without the limits of a limited jurisdiction, might be raised by plea in the court below, and the question being one of fact, seemed proper for the decision of the inferior court, and there was no reason to suppose that they would come to a wrong conclusion and exceed their jurisdiction (*i*); but the court will grant the writ even in these cases, if it deems it advisable; and it is laid down that the writ ought to go in any stage of the proceedings below, if the superior court see sufficient reason to suppose that the inferior court is exceeding, or is about to exceed, its jurisdiction (*j*).

Prohibition after judgment and execution.—"The king's courts at Westminster," observes Lord Coke, "being informed either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before (*k*). If goods seized in execution still remain in specie in the hands of the bailiffs, or the sheriff or officer of the court, the writ may command that they release the distress, and restore the goods to the party from whom they have taken them (*l*). But when goods seized under an execution no longer exist in specie in the hands of the officer, but have been sold, and the proceeds paid over to the execution-creditor, the suit in the inferior court is at an end; everything has been done that can be done,

(*g*) *De Haber* v. *Queen of Portugal*, 20 Law J., Q. B. 480. Crompton, J., *Manning* v. *Farquharson*, 30 Law J., Q. B. 22.

(*h*) Ante, pp. 624–626. *Jackson* v. *Beaumont*, 11 Exch. 300. *Hardy* v. *Walker*, 23 Law J., Exch. 57.

(*i*) *Joseph* v. *Henry*, 19 Law J., Q. B. 369.

(*j*) *Cox* v. *Mayor, &c. of London*, 32 Law J., Exch. 285; 1 H. & C. 338.

(*k*) 2 Instit. 602. *Kimpton* v. *Willey*, 1 L. M. & P. 280.

(*l*) Fitz. Nat. Brev. 46a. *Jones* v. *Owen*, 18 Law J., Q. B. 8.

and no prohibition can then be issued or enforced, for there is nothing left to prohibit (*m*).

"If it appears," observes Lord Mansfield, "upon the face of the proceedings, that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is nullity; it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by, and suffer that court to go on under an apparent jurisdiction, it would be unreasonable that this party who, when defendant below, has thus lain by, and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition against it after all this acquiescence in the jurisdiction of the court below" (*n*).

Prohibition where appeal lies.— It is no ground for refusing a writ of prohibition to show that the party applying for it has a power of appeal, or has appealed, against the decision of the court below, for "the power of prohibition is in no case taken away by the privilege of appeal" (*o*).

Prohibition to the ecclesiastical courts to restrain their proceedings in a matter or cause before them will be granted whenever it is shown that the court has done, or is about to do, something contrary to the general law of the land, or manifestly beyond the jurisdiction of the court; but not to correct mere irregularities of practice (*p*), or misconstruction of the canons of the church, in matters not affecting the rights and liberties of the subject at common law (*q*).

The principle on which the writ goes to the spiritual court, as stated by Blackstone (*r*), is the danger of a different decision of the same rights, and even of the same identical interests by different courts, "an impropriety, he observes, which no wise government can, or ought to, endure, and which is, therefore, a ground of prohibition" (*s*). The writ is granted not only where a plain and manifest excess of jurisdiction has been claimed or exercised by the court, but also in cases where, although the subject-matter is of ecclesiastical cognizance, yet the party would receive some wrong or injury by the course of proceeding in the ecclesiastical court, or be deprived of some benefit or advantage to which the common or statute law would have entitled him. One class of those cases is, where such court is proceeding to try a matter which is triable only by

(*m*) *Denton* v. *Marshall*, 32 Law J., Exch. 91. *Poe, in re*, 5 B. & Ad. 681.

(*n*) *Buggin* v. *Bennett*, 4 Burr. 2037. *Yates* v. *Palmer*, 1 D. & L. 288. Ld. Abinger, *Roberts* v. *Humby*, 3 M. & W. 122; ante, pp. 847, 848.

(*o*) Ld. Denman, C. J., *Burder* v. *Veley*, 12 Ad. & E. 263. *Jackson* v. *Beaumont*, 11 Exch. 300; 24 Law J., Exch. 301.

(*p*) 2 Instit. 599–617. Bull, N. P. 218. *Gould* v. *Capper*, 5 East, 365. *Burder* v. *Veley*, 12 Ad. & E. 261. *Story, ex parte*, 8 Exch. 201; 22 Law J., Exch. 33.

(*q*) *Titchmarsh* v. *Chapman*, 1 D. & L. 732.

(*r*) Vol. iii. pp. 112, 113.

(*s*) *Burder* v. *Veley*, 12 Ad. & E. 259.

the common law, as a custom, prescription, or *modus*. Another, where, in a case of spiritual cognizance, a collateral question arises which is not properly of spiritual cognizance, in which case the courts of common law oblige the ecclesiastical court to admit such evidence as the common law would allow (*t*); as when a lease is offered to be proved in an ecclesiastical court, and is rejected because by their law two witnesses are required; or, for the same reason, where the fact in dispute is the payment of a legacy. Another, where the spiritual court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal courts.

When the very groundwork and foundation of the proceedings of the spiritual court is the holding of a supposed church-rate to be a valid rate, which upon the construction of a court of common law is held to be no rate at all, in such case, in order to prevent the conflict which would arise from a decision taking place one way in the spiritual court, and the opposite way in the courts of common law, a prohibition is allowed to go (*u*).

It appears that prohibitions have been granted where the ecclesiastical court is proceeding to compel a person to contribute to the repair of a parish church as an inhabitant whose land in the parish is on lease (*x*); or where a person is charged in the parish where he inhabits in respect of land out of it (*y*); or where a man who takes a standing in the market in one parish, but dwells in another, is sued for repairs of the church of the former parish (*z*); or where one is rated in respect of land for ornaments (*a*); or where the rate is on some of the inhabitants only (*b*); or where the suit is to enforce an ancient rate, made some time before, and which had been made originally by commissioners of the ecclesiastical court (*c*); or where the bishop's commissioners have made a rate, and the suit is to enforce it (*d*); or where the rate was made by the churchwardens without calling together the parishioners; or for a parish rate for making and repairing a parish organ (*e*). In all these and many other cases, the prohibition was allowed to issue, although the whole subject-matter of church-rates, and the enforcing of them, is within the jurisdiction of the spiritual court (*f*).

A prohibition will also go to the ecclesiastical courts to prevent them from taking cognizance of any suit or proceeding for defamation and

(*t*) *Breedon* v. *Gill*, 1 Ld. Raym. 219, 222.
(*u*) *Richards* v. *Dyke*, 3 Q. B. 256. Eyre, C. J., *Home* v. *Camden*, 2 H. Bl. 533. Ellenborough, C. J., *Gould* v. *Capper*, 5 East, 370.
(*x*) *Jeffrye's* case, 5 Rep. 67b.
(*y*) 17 Vin. Abr., PROHIBITION, H. pl. 4.
(*z*) 2 Roll. Abr., ib. pl. 5.
(*a*) Ib. K. pl. 1.
(*b*) Ib. pl. 10.
(*c*) *Blank* v. *Newcomb*, 12 Mod. 327.
(*d*) *Rogers* v. *Davenant*, 1 Mod. 194; 2 Mod. 8.
(*e*) Anon. 12 Mod. 416.
(*f*) *Veley* v. *Burder*, 12 Ad. & E. 311.

slander, or for brawling in a church or churchyard; which were formerly matters of ecclesiastical cognizance (*g*), but have now been happily removed from the jurisdiction of the spiritual courts (*h*).

Notwithstanding an appeal entered in a superior court of ecclesiastical jurisdiction, the writ of prohibition will go to the inferior spiritual court to stop the appeal, and all further proceeding in the matter; for "there is no reason," observes Lord Denman, "for driving the subject to the expensive process of appealing from one spiritual court to another, to abide the chance of a repetition of the error, which, if committed, can at last be rectified only by prohibition, and may be so committed as to be placed beyond the reach even of that remedy." If the party has appealed, the superior court not only may, but must, prohibit, wherever the error involving the want of jurisdiction is apparent upon the face of the proceedings, "though repeated adjudications to the same effect have been made in the courts below, and even after the solemn sentence of a spiritual court on final appeal" (*i*).

The writ of prohibition to restrain a county-court judge from further proceeding in a matter over which he has no jurisdiction, is a writ of right to which a party is entitled *ex debito justitiæ*. If the want of jurisdiction appears upon the face of the proceedings, "the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it" (*k*). And if the defect does not appear upon the face of the proceedings, the facts and circumstances depriving the court of jurisdiction may be brought before the superior court by affidavit; and the court is bound to issue the writ on fair and reasonable ground being shown for it (*l*). The writ lies only where the county court has assumed to act without or beyond its jurisdiction. It does not lie to protect an injured party from the consequences of a mistake made by the judge upon a question of fact (*m*), or in point of law (*n*). A mistake in the latter respect would, ordinarily speaking, be matter of error; and the act creating the county courts has taken away that form of remedy. Therefore, where the defendant having been summoned to the county court in an action for goods sold and delivered, set up as a defence that the plaintiff had already recovered judgment against him for the same debt in another court, and the plaintiff admitted that it was so, and the county-court judge nevertheless overruled the defence, and gave judgment for the plaintiff,

(*g*) *Evans, ex parte*, 2 Dowl. N. S. 726.

(*h*) 18 & 19 Vict. c. 41; 23 & 24 Vict. c. 32; but brawling by persons in holy orders is still within the cognizance of the spiritual courts, *ib.*

(*i*) *Burder* v. *Veley*, 12 Ad. & E. 260, 263. *White* v. *Steel*, 12 C. B., N. S. 383; 31 Law J., C. P. 268.

(*k*) *Burder* v. *Veley*, 12 Ad. & E. 256.

(*l*) *Jackson* v. *Beaumont*, 11 Exch. 302; ante, p. 626.

(*m*) *Robinson* v. *Lenaghan*, 2 Exch. 337.

(*n*) *Lexden Un.* v. *Southgate*, 23 Law J., Exch. 316.

the court refused a rule for a prohibition, saying that the decision of the judge was final, whether it was right or wrong (*o*).

We have seen that every judge of an inferior court must have some cause of action, charge, or complaint before him, into which he has authority to inquire, or his proceedings will be extra-judicial (*p*); but if a county-court judge having a plaint before him for a cause of action within his jurisdiction, finds a verdict for the plaintiff without a particle of evidence to support it, this is, it seems, no ground for a prohibition (*q*). It would be desirable, however, that there should be some means of preventing a verdict or judgment from being enforced under such circumstances (*r*).

If the claim in the county court is substantially for a matter excluded from its jurisdiction, but the plaint and particulars are framed so as to show a cause of action within its jurisdiction, the superior court will look beyond the record in the county court to ascertain the real nature of the claim (*s*); and if that appears to be not within the cognizance of the court, a prohibition will be granted. Thus, where a plaintiff in his plaint and particulars sued for a debt of 18*l*., for money paid and for loss of time in attending before magistrates for, and on behalf of, the defendant, and it appeared that the action was brought to recover expenses incurred by the plaintiff by reason of his having been wrongfully summoned before certain magistrates at the instance of the defendant, it was held that the cause of action, if any existed, was for a malicious prosecution over which the county court had no jurisdiction, and the plaintiff could not, by putting down the items of his expenses and pecuniary loss, concoct a debt for the purpose of giving an apparent colourable authority to the county-court judge to take cognizance of the matter (*t*).

If, under colour of proceeding upon a plaint for a trespass by false imprisonment, the complainant and the court proceed to try what is in substance and effect an action for a malicious prosecution, a prohibition will issue to prevent any proceeding being taken upon the judgment. Thus, if the defendant, upon a suspicion of felony, has made a complaint and charge to the police, upon which they have themselves acted, and taken the plaintiff into custody, then, as trespass for false imprisonment is not maintainable for that, but an action on the case, a prohibition will go to the county court, if it proceeds to try and give judgment. But where the defendant has expressly directed the constable to take the plaintiff into custody, and has thereby rendered himself amenable to an action of trespass for an assault and false imprisonment, and the plaintiff brings

(*o*) *Toft* v. *Rayner*, 5 C. B. 162. *Smith* v. *Mayor of London*, 6 Mod. 78.

(*p*) *Hopper, in re*, ante, p. 548; and see ante, p. 607.

(*q*) *Lexden Union* v. *Southgate*, 23 Law J., Exch. 316.

(*r*) And see, ante, pp. 625, 626.

(*s*) Ante, pp. 624–626.

(*t*) *Hunt* v. *North Staff. Rail. Co.*, 2 H. & N. 451; 26 Law J., Exch. 374.

his plaint for that act of trespass only, the county court has jurisdiction to try it, though the other circumstances in the case would properly be the subject of an action for a malicious prosecution (*u*).

If the plaint in the county court is for a debt or legacy, or share of a residuary estate bequeathed by will, and it appears that the money claimed is covered by a trust, and that the plaintiff and defendant stand in the relative positions of trustee and *cestui que* trust, a prohibition will be granted to prevent the county court from interfering with the execution of such trust (*v*), for the county court has no jurisdiction over equitable estates and interests, and no power to enforce claims made upon a trustee by his *cestui que* trust (*x*), except where the trustee has stated an account, or expressly admitted a sum of money to be due to his *cestui que* trust (*y*), or where he holds a legacy with a simple direction to pay over the money to a person who is capable of giving him a good legal discharge on receiving the amount (*z*).

If a plaintiff, having one entire cause of action for an amount exceeding what the county court is entitled to take cognizance of, splits his cause of action into divers causes of action, and founds thereon divers suits in the county court, a prohibition will be granted to stop the unlawful proceedings (*a*). But it is competent to a plaintiff to abandon the excess of his claim above 50*l.*, in order to give the county court jurisdiction, by giving notice of abandonment to the defendant on or before the hearing of the cause (*b*); but the abandonment must be made either by the plaintiff himself, or by some person authorised on his behalf. The judge has no power to make the abandonment at the trial as an act of his own, and if he does so all proceeding upon the judgment may be arrested by prohibition (*c*).

We have seen that, in certain cases, a plaintiff in the county court may, by leave of the judge, sue in the district where the cause of action arose; but that, to give the court jurisdiction in these cases, the whole cause of action must arise within the district, and that it is not enough to show that some material part of it arose therein (*d*). Where divers

(*u*) *Chivers* v. *Savage*, 5 Ell. & Bl. 701, explaining *Jones* v. *Currey*, 2 L. M. & P. 474. *Guest* v. *Warren*, ante, p. 859.

(*v*) *Beard* v. *Hine*, 10 W. R. 45. *Hewston* v. *Phillipps*, 11 Exch. 699; 25 Law J., Exch. 133.

(*x*) *Longbottom* v. *Longbottom*, 8 Exch. 208; 22 Law J., Exch. 76.

(*y*) Addison on Contracts, 5th edn. pp. 36, 37.

(*z*) *Pears* v. *Wilson*, 6 Exch. 833.

(*a*) *Grimbly* v. *Ackroyd*, 17 Law J., Exch. 157. *Catchmade's* case, 6 Mod. 91. *Kimpton* v. *Willey*, 9 C. B. 719.

(*b*) *Isaac* v. *Wyld*, 7 Exch. 103. The county-court rules require notice of the abandonment to be entered on the particulars of demand, R. 35.

(*c*) *Hill, in re*, 10 Exch. 726; 24 Law J., Exch. 137. *Hopper, in re*, ante, p. 548.

(*d*) S. 60 of the statute 9 & 10 Vict. c. 96, declares in what cases a summons may issue from the county court (ante, p. 844), and not s. 128, which merely gives a plaintiff the option of suing in the superior courts when the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court where the defendant dwells or carries on his business at the time of action brought, ante, pp. 927, 928.

acts have to be done before there is any cause of action, the cause of action arises in the district where the last act was done; and if an action is brought in any other county court, the progress of the suit may be arrested by prohibition, unless the defendant dwells or carries on his business in the district, as previously mentioned (*e*).

When a question of title to land, or to any incorporeal hereditament, is raised before the county court, or any other inferior tribunal, having no power to adjudicate upon the question (ante, p. 846), it is the duty of the court, as we have seen, to inquire into the facts, so far as may be necessary to enable them to ascertain whether the title really does come in question; but if they come to a wrong conclusion, and proceed to hear and adjudicate when they ought not to have done so, all proceedings upon the judgment may be stayed by prohibition (*f*).

A county-court judge can neither give himself jurisdiction where he has it not, nor deprive himself of jurisdiction where he has it, by an erroneous decision on a matter of fact. A writ of prohibition sometimes issues to a county-court judge to prohibit him from proceeding in one direction, in order to compel him to exercise his judicial functions in another direction, where he has declined jurisdiction, and was wrong in so doing (*g*).

Where a county-court judge having heard, and adjudicated upon, a plaint before him, and given a verdict for the defendant, afterwards and after the judgment had been recorded, and the parties had left the court, rescinded his decision, and ordered the cause to be adjourned to the next court, and then gave judgment for the plaintiff, it was held that, having decided the case in the first instance, he was *functus officio*, and could not afterwards alter his judgment; that he had therefore exceeded his authority in giving the second judgment, and that a prohibition must go to restrain all proceedings thereon. But the judge may alter his judgment before it is recorded, and the record may be amended to correct a mistake, provided it be done the same day, and at the same court, in the presence of the parties (*h*).

If a county-court judge has entertained an application for a new trial, and pronounced his decision upon it, and entered his judgment of record, he cannot rescind his judgment and entertain a fresh application (*i*).

A prohibition cannot be issued to the county court after execution,

(*e*) Ante, p. 844. *Barnes* v. *Marshall*, 18 Q. B. 785. *Buckley* v. *Hann*, 5 Exch. 43. *Wilde* v. *Sheridan*, 21 Law J., Q. B. 260. *Aris* v. *Orchard*, ante, p. 844; and see *Newcombe* v. *De Roos*, 20 Law J., Q. B. 4.

(*f*) *Thompson* v. *Ingham*, *Chew* v. *Holroyd*, ante, p. 846. *Knowles* v. *Holden*, 24 Law J., Exch. 223. *Lawford* v. *Partridge*, ante, p. 845.

(*g*) *Hardy* v. *Walker*, 23 Law J., Exch. 57.

(*h*) *Jones* v. *Jones*, 17 Law J., Q. B. 170.

(*i*) *Mossop* v. *Gt. Northern Rail. Co.*, 16 C. B. 580. *Gt. North. &c.* v. *Mossop*, 17 ib. 130; 2 Jur. N. S. 21.

and a levy and a payment of the amount thereof to the execution-creditor for the action is then at an end, and there being no further proceeding to be taken in the matter, there is nothing to prohibit (*k*).

Whenever objection is taken to the jurisdiction of a county-court judge, it is his duty to set out the facts upon the record, so that the superior courts may see the grounds upon which he proceeded, and the subject may not be left without the redress to which he is by law entitled (*l*). He ought to assist parties in obtaining their right to a decision of the superior court (*m*).

Prohibition to the Lord Mayor's Court cannot be issued when the question of jurisdiction depends upon a matter of fact proper for the determination of that court, and the want of jurisdiction does not appear upon the face of the proceedings; for by the Mayor's Court of London Procedure Act (*n*) it is enacted, that "no defendant shall be permitted to object to the jurisdiction of the court, in or by any proceeding whatever, except by plea." Where, therefore, a person was sued for a debt in the Lord Mayor's Court, and it appeared that no part of the cause of action arose within the locality over which the court had jurisdiction, it was held that the defendant must raise the objection to the jurisdiction by plea, and that the court must decide upon it, and that a prohibition to prevent it from so doing could not be granted (*o*).

Proceedings in prohibition:—By 1 Wm. 4, c. 21, s. 1, it is enacted, that an application for a prohibition may be made on affidavits only, and in case the party applying shall be directed to declare in prohibition, the declaration shall be expressed to be on behalf of such party only, and not on his behalf and that of the Crown, and shall set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application, and shall conclude by praying a writ of prohibition; to which declaration the party defendant may demur or plead such matters as may be proper, to show that the writ ought not to issue, and the party in whose favour judgment shall be given shall be entitled to costs, &c.; and in case a verdict shall be given for the party plaintiff, it shall be lawful for the jury to assess damages. "The legislature," observes Erle, C. J., "has not given us the slightest intimation what kind of damages is here meant. Perhaps what was intended was to give damages in case execution had issued in the court below, and the goods of the plaintiff in prohibition had been taken by a

(*k*) *Denton* v. *Marshall*, 32 Law J., Exch. 91; 1 H. & C. 654. *Poe, in re*, 5 B. & Ad. 681. *Robinson* v. *Lenaghan*, 2 Exch. 333.

(*l*) Parke, B., *Pears* v. *Wilson*, 6 Exch. 838.

(*m*) Martin, B., *Mungean* v. *Wheatley*, 6 Exch. 102. *Jackson* v. *Beaumont*, 11 ib. 303.

(*n*) 20 & 21 Vict. c. clvii. s. 15 (local and personal).

(*o*) *Manning* v. *Farquharson*, 30 Law J., Q. B. 22. *Cox* v. *Mayor, &c. of London*, 1 H. & Colt. 338; 32 Law J., Exch. 285.

proceeding which afterwards turned out to be contrary to law. I am, however, clearly of opinion that the legislature did not intend that the plaintiff, who declares in prohibition, should recover as damages the costs of the proceedings in an ecclesiastial court upon a verdict in his favour" (*p*).

The application for a prohibition may be made to either of the superior courts, or to a judge at chambers; but, except under special circumstances, it should be made to the latter in the first instance, as well in term time as in vacation. The affidavit used in moving for the rule should set forth the facts necessary to support the application, and should be entitled in the court to which the judge before whom the application is made belongs, but should not be entitled in any cause (*q*). But after a rule has been granted, the affidavits used in showing cause may be entitled in the cause (*r*). The judge's decision, if he refuses a rule, may be reviewed as in ordinary cases (*s*).

The rule or summons to show cause why a writ of prohibition should not issue to a county court operates as a stay of proceedings in the cause, if the superior court or judge so directs, until the determination of the rule or summons, or until the superior court or judge thereof otherwise orders; and the judge of the county court is required to adjourn the hearing of the cause until the matter is determined. When the writ is issued to the judge of the county court, the matter is now finally disposed of by rule or order, and no declaration or further proceeding in prohibition are allowed (*t*).

Notice of the issue of the writ must be given to the opposite party, and the writ lodged with the registrar of the county court, when the writ is issued to that court, two clear days before the day fixed for the hearing of the cause, or the judge may order the party obtaining the writ to pay the costs of the day, unless some order respecting costs has been made by the judge or court above (*u*).

Refusal of writ when final.—When a superior court, or a judge thereof, has refused to grant a writ of prohibition to the county court, no other superior court or judge can grant the writ. But the party going before a judge in the first instance, may appeal from his decision to the court, and a second application may be made to the same court or judge, on grounds different from those on which the first application was founded (*x*).

(*p*) *White* v. *Steel*, 13 C. B., N. S. 235; 32 Law J., C. P. 2.

(*q*) *Evans, ex parte*, 2 D., N. S. 410; 12 Law J., Q. B. 68.

(*r*) *Breedon* v. *Capp*, 9 Jur. 781. Corner's Crown Pr., PROHIBITION.

(*s*) 13 & 14 Vict. c. 61, s. 22, Chitt. Arch. Pr., PROHIBITION.

(*t*) 19 & 20 Vict. c. 108, ss. 40, 42. As to costs in the county court, ib. ss. 40, 41. As to prohibition in copyright cases in the county court, 21 & 22 Vict. c. 70, s. 9. And see Arch. Pr., PROHIBITION.

(*u*) 19 & 20 Vict. c. 108, s. 41.

(*x*) Ibid. s. 44.

Of the setting aside writs of prohibition issuing out of Chancery. — By the Petty Bag Office and Enrolment in Chancery Amendment Act, 1849 (12 & 13 Vict. c. 109), it is enacted (s. 39), that in every action, suit, and proceeding on the common-law side of the Court of Chancery, it shall be lawful for the superior courts of common law, and the judges thereof, and they are thereby required to hear and determine all matters and applications incident to such actions, &c.; and it has been held that the superior courts have jurisdiction under this statute, to set aside a writ of prohibition improperly issued out of the Court of Chancery to a county court (*y*).

SECTION III.

OF THE REMEDY BY CERTIORARI.

The writ of certiorari is a writ issued out of Chancery, or out of the Court of Queen's Bench, or some one or other of the Queen's courts at Westminster, for the purpose of removing some cause, suit, or proceeding from an inferior to the superior court, either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order or judgment of such inferior court given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant, sued in such inferior court, surer and more certain justice before a higher tribunal.

Where the inferior court has jurisdiction to try the cause, but it is sought to remove it on the ground that it is a fit matter for the decision of a superior court (post, pp. 960, 961), the writ must be obtained and served before issue has been joined in the inferior court, and before the first juryman has been sworn (*z*), except in those cases where the writ is applied for with the view of enforcing in the superior court the judgment of an inferior tribunal (*a*).

Where the inferior court has no jurisdiction, on the other hand, over the cause or matter brought before it, the writ may be applied for after judgment and execution (ante, pp. 949, 950), if the want of jurisdiction appears upon the face of the proceedings, or exception to the jurisdiction was taken at the trial, and the circumstances depriving the court of

(*y*) *Baddeley* v. *Denton*, 4 Exch. 508; Chitt. Arch. Pr., part xii.

(*z*) 43 Eliz. c. 5, s. 2; 21 Jac. 1, c. 23, s. 2. *Laverack* v. *Bean*, 3 M. & W. 62. Holroyd, J., *Walker* v. *Gann*, 7 D. & R. 772. Williams, J., *Kemp* v. *Balne*, 1 D. & L. 885.

(*a*) Chitt. Arch. Pr., CERTIORARI. A county-court judgment is not removable for the purpose of having execution thereon, *Morelon* v. *Holt*, 20 Exch. 707; 24 Law J., Exch. 269.

authority in the matter were brought to the knowledge of the judge (ante, pp. 548, 549, 598, 599), and the objection was improperly overruled, and judgment wrongfully given against the defendant (ante, pp. 549, 551, 625, 626); but where the want of jurisdiction does not appear upon the face of the proceedings, and no objection to the jurisdiction was raised by the defendant in the court below, until after the matter had been decided against him (ante, pp. 598, 599, 847, 848), or the defendant has failed to draw the attention of the judge to the facts and circumstances depriving him of jurisdiction, the court will not, as we have seen (ante, pp. 548, 549, 610), grant the writ, or interfere in the matter. Thus, where an application was made for a certiorari to bring up an order of sessions for payment of costs, for the purpose of quashing it, on the ground that the costs were taxed after the sessions had expired, and the authority of the court had ceased (*b*), but it appeared that the applicant had attended the taxation, and made no objection thereto whilst it was going on, it was held that he had waived his right to object, and had no claim to the writ (*c*); for wherever a party makes no objection to the jurisdiction of the court whilst the case is proceeding, but apparently acquiesces, and suffers the court to act without protest or objection, as if it had jurisdiction down to actual judgment, it is then too late to apply for a certiorari, unless the defect appears upon the face of the proceedings (*d*).

Grounds for the issue of the writ may be established either by showing that the inferior court had no power to adjudicate upon the matter brought before it, or that it has exceeded its authority in adjudicating upon it, and that objection was taken to the jurisdiction before the court gave judgment in the matter (*e*), or that difficult and important questions of law will arise, and have to be decided, or that a fair trial cannot be had, or an impartial jury be obtained, or that the judge or magistrate who has adjudicated had some personal interest in the subject-matter of the suit or proceeding (*f*). A certiorari is never granted where a procedendo cannot be awarded. Where, therefore, a magistrate gives notice that he objects to be sued in the county court (ante, p. 635), and by so doing puts an end to the proceedings there, he cannot afterwards remove them into the superior court (*g*).

The writ lies at common law, as we have seen, for the purpose of removing convictions and orders of magistrates made without jurisdiction, although the writ is expressly taken away by statute (ante, pp. 622, 623), for a legislative prohibition of removal by certiorari applies only to cases

(*b*) *Reg.* v. *Long*, 1 Q. B. 740.
(*c*) *Watkins, ex parte*, 10 W. R. 249; ante, pp. 847, 848. *Freeman* v. *Read*, ante, p. 848.
(*d*) *Yates* v. *Palmer*, 1 D. & L. 288.
(*e*) *Rees* v. *Williams*, 7 Exch. 51; ante, pp. 548, 598, 599.
(*f*) *Reg.* v. *Suffolk*, 18 Q. B. 416; ante, p. 599.
(*g*) *Weston* v. *Sneyd*, 1 H. & N. 703.

which the inferior court has authority to try, and not to causes which are not within the cognizance of the inferior tribunal (*h*).

Upon an inquisition of damages before the sheriff, where the jury have included in their estimate of damages matters which were not the proper subject of compensation, and which they had no power or authority to consider, the writ lies to bring up the inquisition and proceedings for review by a superior court, and the excess of jurisdiction may, as we have seen, be shown by affidavit, and need not appear upon the face of the proceedings (*i*).

Certiorari to remove causes from the county court, where the court has jurisdiction to try the cause, and the claim does not exceed 5*l.*, can only be obtained in cases which the court, or a judge, deems fit to be tried in the superior court, and where the party applying for the writ gives security, to be approved of by one of the masters, for the amount of the claim and the costs of the trial, not exceeding in all 100*l.*, and assents to such terms as the court or judge may think fit to impose (*k*). When the claim in the county court exceeds 5*l.*, and the court has jurisdiction over the subject-matter of the action, the issue of the writ is discretionary with the judge of the superior court to whom the application is made, and is not a matter of right. It is to be granted upon such terms as to payment of costs, and giving security for debt or costs, or such other terms as the judge shall think fit.

The statute 13 & 14 Vict. c. 61, s. 14, giving a right of appeal to some one or other of the superior courts, from the decision of the county-court judge, in cases where the amount claimed exceeds 20*l.* (post, p. 961), and enacting (s. 16) that no judgment, order, or determination of any judge of a county court, nor any cause or matter brought before him, or pending in his court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provision thereinbefore mentioned, does not affect the right of removal by certiorari, where the damages claimed exceed 5*l.*; for by s. 2 of the statute it is declared, that that act, and the act of 9 & 10 Vict. c. 95, shall be read and construed as one act, just the same as if the several provisions of the former statute, not inconsistent with the provisions of the later statute, were repeated and re-enacted therein.

"The provision of the act of 9 & 10 Vict. c. 95, is by no means inconsistent," observes Parke, B., "with the right of appeal given by 13 & 14 Vict. c. 61, ss. 14, 15. They may both well stand together, and, there-

(*h*) *Reg.* v. *Badger*, 6 Ell. & Bl. 137. As to cases in which the writ is not taken away by statutory prohibition, see, ante, pp. 623, 624.

(*i*) *Penny, in re*, ante, p. 666.

(*k*) 19 & 20 Vict. c. 108, s. 38. As to the mode of giving security, see ss. 70, 71.

fore, the last-named statute is to be read as if that clause were in it" (*l*). The writ of certiorari, therefore, for the removal of a cause from the county court, where the damages claimed exceed 5*l.*, is untouched by the stat. 13 & 14 Vict. c. 61, s. 16 (*m*). When the writ is sought for on the ground that the county court has no jurisdiction in the matter, it is grantable *ex debito justitiæ*, and as a matter of right, on fair ground being shown for contending that the court has no jurisdiction (*n*).

Of the concurrent remedy by appeal and by certiorari.—By 13 & 14 Vict. c. 61, s. 14, a right of appeal against the decision of the county-court judge is given, whenever the amount recoverable by action in the county court exceeds 20*l.*, and the defendant is "dissatisfied with the determination of the court in point of law, or upon the admission or rejection of any evidence;" but notice must be given within ten days to the opposite party, or his attorney, and security must also be given for costs (*o*). It is not the amount for which the action is brought that determines the right of appeal, but "the amount recoverable," or the sum that may reasonably be expected to be recovered (*p*).

The statutory power of appeal does not, as we have seen, in anywise abridge the common-law right of a party to a certiorari (*q*); and if an appeal has been actually entered, a certiorari may nevertheless be obtained for the purpose of annulling an order or judgment on the ground of want of jurisdiction, or excess of jurisdiction (*r*).

The application for the writ should be made to a judge at chambers in the first instance, and not to the court (*s*); and an appeal lies from his decision to the full court. A certiorari to remove a plaint from the county court may issue on an *ex parte* application, without notice to the opposite party (*t*); but when it is sought for to remove an order of justices, or an order of sessions, six days' notice of the application must be given in the manner previously mentioned, to the justice or justices making the order, or to two justices present at the sessions when the order was made (*u*). The application must be made by, or in the name of, the party aggrieved by the order or proceeding, and not by some other person, not being his attorney or agent duly authorised to act on his behalf (*v*).

Affidavits when necessary.—When the application for the writ is founded on the want of jurisdiction, and the defect appears upon the face

(*l*) *Parker* v. *Brist. & Ex. Rail. Co.*, 6 Exch. 184; 20 Law J., Exch. 112. *Brookman* v. *Wenham*, 20 Law J., Q. B. 278; 2 L. M. & P. 233.

(*m*) *Box* v. *Green*, 9 Exch. 503.

(*n*) *Jackson* v. *Beaumont*, 11 Exch. 300; ante, pp. 843–848.

(*o*) 13 & 14 Vict. c. 61, s. 14.

(*p*) *Mayer* v. *Burgess*, 4 Ell. & Bl. 655.

(*q*) Ante, pp. 34, 620, 635.

(*r*) *Jackson* v. *Beaumont*, 11 Exch. 300; ante, p. 952.

(*s*) *Robertson* v. *Womack*, 19 Law J., Q. B. 367. *Bowen* v. *Evans*, 3 Exch. 111. *Staples* v. *Accid. Death Ins. Co.*, 10 W. R. 59; and see Corner's Crown Pr., CERTIORARI.

(*t*) *Symonds* v. *Dimsdale*, 2 Exch. 533.

(*u*) Ante, p. 624. *Reg.* v. *Suffolk*, 18 Q. B. 416.

(*v*) *Reg.* v. *Riall*, 11 Ir. C. L. R. 280.

of the proceedings, an affidavit is not necessary for the support of the application; but every suggestion that does not appear upon the face of the proceedings, but is collateral and out of the proceedings, ought to be verified by affidavit (*x*). All the material facts of the case should be stated by affidavit, that the judge may be able to impose such terms upon the parties as he, in the exercise of his discretion, may think requisite (*y*). The rule for the writ is absolute in the first instance (*z*).

Notice of the issue of the writ must be given, and the writ itself lodged with the registrar, as in the case of the issue of a writ of prohibition (*a*).

The effect of the issue of the writ is to stay all proceedings in the inferior court, if the superior court or judge thereof so directs, as in the case of the issue of a prohibition (*b*). It is the duty of a county-court judge to receive and yield obedience to the writ, and do all that is necessary to be done for the removal of the cause; and if he fails to do so, the court will issue an attachment against him (*c*).

The effect of the refusal of a writ of certiorari, and the power of making a second application, is the same as in the case of the application for a writ of prohibition (*d*).

Proceedings after removal.—After the cause has been removed by certiorari, the plaintiff may proceed or not, as he thinks fit (*e*).

Quashing of the writ—Procedendo.—If the writ of certiorari has been improvidently issued in a case where it did not lie (*f*); or if it has been misdirected, or is otherwise bad in law; or if it appears from the admission of the party suing it out, that he issued it merely for purposes of delay (*g*); or if it is shown that the rules and practice of the court have not been complied with, the writ may be quashed, and a procedendo awarded, which is a writ sending the case back for trial to the inferior court. The writ of procedendo may be granted *ex parte* by a single judge at chambers; and it is in his discretion whether the order for the issue of the writ shall be made upon a summons to show cause, or immediately (*h*). The writ of procedendo may, in its turn, be quashed, and the cause again remanded to the superior court, on the ground that the procedendo itself has been improvidently awarded (*i*).

(*x*) *Buggin* v. *Bennett*, 4 Burr. 2037; ante, pp. 624–626, 666. Corner's Crown Pr., AFFIDAVITS.

(*y*) *Parker* v. *Brist. & Ex. Rail. Co.*, 6 Exch. 184.

(*z*) *Pawsey* v. *Gooday*, 3 Dowl. 605. *Dowding* v. *Gt. West. Rail. Co.*, 3 Jur. N. S. 1130.

(*a*) 19 & 20 Vict. c. 108, s. 41, ante, p. 957.

(*b*) Ibid. s. 40, ante, p. 957.

(*c*) *Mungean* v. *Wheatley*, 6 Exch. 88.

(*d*) 19 & 20 Vict. c. 108, s. 44, ante, p. 957.

(*e*) *Garton* v. *Gt. Western, &c.*, ante, p. 934.

(*f*) *Rees* v. *Williams*, 21 Law J., Exch. 24.

(*g*) *Landens* v. *Shiel*, 3 Dowl. 90.

(*h*) *Reg.* v. *Scaife*, 18 Q. B. 773; 21 Law J., M. C. 221. Corner's Crown Pr., PROCEDENDO.

(*i*) Chitt. Arch. Pr., CERTIORARI.

CHAPTER XXIV.

OF THE REMEDY BY MANDAMUS.

SECTION I. — *Of the remedy by mandamus for the vindication of rights and the enforcement of the performance of public duties.* — The prerogative writ of mandamus — Mandamus to judicial officers to hear and adjudicate — Mandamus to ministerial officers, and to overseers and rectors — Of the granting of the writ where there is another remedy — Mandamus to compel the surrender of public documents, to restore to a public freehold office — How a freehold office may be forfeited and vacated — Offices held at will — Visitatorial power excluding the proceeding by mandamus — Mandamus to restore the name of a medical practitioner to the medical register, to test the validity of an election, to elect corporate and public officers, to enforce an appointment to a public or corporate office, to make calls, to levy rates and discharge judgment debts, &c., to make compensation for lands taken and injuries inflicted in the exercise of statutory powers — Laches and delay in applying for the writ — Proceedings upon a mandamus — Conditions precedent to the issue of the writ — Parties to whom the writ is to be directed — Service of the writ — Time for taking objections — Pleas to the return — Damages and costs — Actions and informations for a false return — Judgment non obstante veredicto — Attachment for disobedience of peremptory writ.

SECTION II. — *Of the claim to a writ of mandamus in an action at common law.* — Of the union of an action in respect of a private injury with a claim for a mandamus — Actions in which a claim for a mandamus may be sustained — Actions in which a claim for a mandamus cannot be sustained — The declaration in the action — Pleadings — Damages — Costs — Orders for the rectification of registers of shareholders.

SECTION I.

OF THE REMEDY BY MANDAMUS FOR THE VINDICATION OF RIGHTS, AND THE ENFORCEMENT OF THE PERFORMANCE OF PUBLIC DUTIES.

The prerogative writ of mandamus is a writ issuing in the Queen's name from the Court of Queen's Bench, directed to some chartered, corporate, or public body, or official person, commanding the performance of some public act, or duty, therein specified, in the performance of which

the party claiming the writ is interested, or by the non-performance of which he is aggrieved or injured (*k*). It was termed a prerogative writ because the power to award it rested with the justices of the Court of Queen's Bench, in which court the sovereign is supposed to be personally present (*l*). Through the medium of this writ the Court of Queen's Bench exercises a vigilant control over all public officers, corporations, and chartered companies, and persons intrusted with extensive powers for public purposes, and enforces the exercise of such powers within reasonable limits, more especially where there is no other efficient or convenient remedy (*m*).

Mandamus to enforce statutory, corporate, and public duties and obligations.—Whenever the law requires a thing to be done, and the public at large are interested in the doing of it, a mandamus will go to order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself in motion to do the thing, though it cannot control his discretion (*n*). Permissive words, authorising a thing to be done, are often held to be directory and compulsory, when the power or authority has been given in order that it may be exercised for the public benefit (*o*), and the public interests manifestly require the authority to be acted upon.

Thus, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats *may*, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, &c.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants (*p*).

But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it be shown that the public interests manifestly require such a construction to be put upon them. Railway acts, incorporating railway companies, and authorising the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public, but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or

(*k*) *Reg.* v. *Chichester* (*Bishop of*), 29 Law J., Q. B. 23; 6 Jur. N. S. 120. *Briggs, ex parte*, 28 ib. 272.

(*l*) Com. Dig., MANDAMUS, A.

(*m*) Ld. Denman, C. J., *Reg.* v. *East. Co. Rail. Co.*, 10 Ad. & E. 531.

(*n*) Best, J., *Rex* v. *North Riding, &c. Justices*, 2 B. & C. 291. *Rex* v. *Kent Justices*, 14 East, 395. *Rex* v. *Cumberland Justices*, 1 M. & S. 194.

(*o*) Com. Dig., PARLIAMENT, R. 22.

(*p*) *Rex* v. *Mayor of Hastings*, 1 D. & R. 148; 5 B. & Ald. 692, n. *Rex* v. *Avering Atte Bower*, ib. 691. *Rex* v. *Wells* (*Mayor of*), 4 Dowl. P. C. 562.

refrain altogether from using them (*q*). And when the words of a statute or charter are imperative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances have arisen rendering the exercise of the statutory power and command impracticable (*r*).

Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate.—We have seen that, by 11 & 12 Vict. c. 44, s. 5 (ante, p. 628), more simple means (by rule to show cause, ante, p. 628) than the ordinary remedy by mandamus have been devised for compelling justices of the peace to exercise the duties of their office, where the legality of their proceedings is likely to be called in question, and they refuse to act by reason of doubts entertained by them as to the extent of their authority and jurisdiction. The proceeding established by this statute is cumulative upon the ordinary common-law remedy by mandamus which still goes to courts of quarter-session, recorders of boroughs, justices of the peace, and judges of inferior courts of record, other than county-court judges, to compel them to fulfil the duties of their several offices, and receive, hear, and adjudicate upon an information, claim, or dispute brought before them, and which they have refused to hear and adjudicate upon, from some erroneous view of the law, or of the extent of their powers and jurisdiction (*s*); but where they have entered upon the matter and given the parties a hearing, and have decided, the court will not, by mandamus, review their decision, or compel them to rehear the case on the ground that they have come to a wrong conclusion in point of law (*t*). That must be done on appeal, where an appeal is given, or on a case stated for the opinion of the court (*u*); for "the Court of Queen's Bench has never, in cases of applications for a mandamus to judges or courts of a judicial character, assumed a power to do more than to direct them to hear and decide; it has never dictated to them in what manner they are to decide" (*x*).

The writ of mandamus formerly lay against a county-court judge to compel him to hear and adjudicate upon a claim, and give judgment upon a verdict (*y*). But, by the County-Court Acts, the remedy by mandamus against a county-court judge, or any officer of the county court, for refus-

(*q*) *York & North Mid. Rail. Co.* v. *The Queen*, 1 Ell. & Bl. 861; 22 Law J., Q. B. 225. *Gt. Western Rail. Co.* v. *The Queen*, 1 Ell. & Bl. 874. Erle, J., *Reg.* v. *North Mid. R. Co.*, 1 Ell. & Bl. 203. *Rex* v. *Birm. Can. Nav.*, 2 W. Bl. 708.

(*r*) *Reg.* v. *Lond. & North-West. R. Co.*, 16 Q. B. 884. *Reg.* v. *Ambergate, &c.*, 1 Ell. & Bl. 381; 22 Law J., Q. B. 191; post, p. 984.

(*s*) *Reg.* v. *Richards*, ante p. 627. *Reg.* v. *Richmond Recorder*, 1 Ell. Bl. & Ell. 253. As to the better and more effective remedy, see ante, p. 532.

(*t*) *Milner, ex parte*, 15 Jur. 1037. *Reg.* v. *Leicester Deputies*, 15 Q. B. 674. *Reg.* v. *Goodrich*, 19 Law J., Q. B. 413. *Reg.* v. *Blanshard*, 13 Q. B. 325. *Reg.* v. *Liverpool Recorder*, 20 Law J., M. C. 37. *Buller, ex parte*, 1 Jur. N. S. 709. *Reg.* v. *East Riding Just.*, 13 Jur. 447.

(*u*) *Reg.* v. *West Riding Just.*, 1 New Sess. Cas. 247.

(*x*) Cockburn, C. J., *Cook, ex parte*, 29 Law J., Q. B. 68; 6 Jur. N. S. 224. *Bird, ex parte*, 28 Q. B. 223.

(*y*) *Reg.* v. *Richards*, 20 Law J., Q. B. 352. *Brooke* v. *Ewers*, Str. 113.

ing to do an act relating to the duties of his office, is taken away, and a different remedy, by rule to show cause and order of court, is substituted in its place (*z*).

What amounts to a refusal to hear and adjudicate.—Where the recorder of a borough refused to hear articles of complaint exhibited against a clerk of the peace, under 5 & 6 Wm. and Mary, c. 21, s. 5, and 5 & 6 Wm. 4, c. 76, s. 103, on its being stated to him that the articles did not charge the clerk with misconduct in his office, the court intimated that he ought to have received the articles of complaint, and adjudicated upon them, but that if he had received them and considered them, and had decided that they did not charge the clerk of the peace with any misconduct in his office, and did not disclose any valid ground for his dismissal, supposing the facts stated in them to have been proved before him, the court could not interfere with his decision (*a*). The recorder has jurisdiction to inquire into the general conduct of the clerk of the peace, as well out of his office as in his office, but he cannot suspend or discharge him for misbehaviour out of the office, unless it be proved before him that the clerk has been convicted of some public offence, rendering him publicly infamous, and unfit to hold any public office (*b*). Where justices or judicial officers have begun to hear a complaint within their jurisdiction, they are bound to hear the whole of the evidence offered, and have no right to stop a complainant and prevent him from bringing his whole cause of complaint before them (*c*).

A mandamus will go to the lord of a manor to compel him to hold a court baron, and to the homage to present conveyances of burgage tenure (*d*); also to hold a court leet to swear in a constable, or to admit persons entitled to a franchise (*e*); also to a corporation, to permit a court leet and court baron to be held, according to immemorial custom, in the town-hall (*f*); also to justices of the peace, to hear and determine a complaint against overseers for not properly accounting (*g*), to examine and allow overseers' accounts (*h*), and to swear them to their accounts (*i*); to proceed against a quaker for a church-rate (*k*), to summon parties for not paying (*l*), and to issue distress-warrants for levying poor-rates (*m*).

(*z*) 19 & 20 Vict. c. 108, s. 43; 21 & 22 Vict. c. 74, s. 4. *Furber, ex parte*, 27 Law J., Exch. 453. *Jardine* v. *Smith*, 8 W. R. 464. *Whitehead* v. *Procter*, 3 H. & N. 532. *Reg.* v. *Harwood*, 22 Law J., Q. B. 127.

(*a*) *Hayward, in re*, Q. B. Hil. Term, 1863.

(*b*) *Rex* v. *Richardson*, 1 Burr. 538.

(*c*) *Rex* v. *Cumberland Justices*, 4 Ad. & E. 695.

(*d*) *Rex* v. *Montacute* (*Ld.*), 1 W. Bl. 60. *Rex* v. *Midhurst*, 1 Wils. 283.

(*e*) *Rex* v. *Colebrooke*, 2 Ld. Kenyon, 163. *Rex* v. *Milverton* (*Ld. of*), 3 Ad. & E. 284.

(*f*) *Rex* v. *Grantham*, 2 W. Bl. 716. *Rex* v. *Ilchester Bailiffs, &c.*, 2 B. & C. 764; 4 D. & R. 324.

(*g*) *Rex* v. *Worcestershire Justices*, 3 D. & R. 299.

(*h*) *Rex* v. *Cambridge Justices*, 8 Dowl. P. C. 89.

(*i*) *Rex* v. *Middlesex Justices*, 1 Wils. 125.

(*k*) *Rex* v. *Freeman*, 2 Ld. Ken. 19.

(*l*) Anon. 2 Chitt. 257.

(*m*) *Luke* (*St.*) v. *Middlesex Justices*, 1 Wils. 133. *Reg.* v. *Cheek*, 11 Jur. 86, n. *Rex* v. *Middlesex Justices*, 2 Ld. Ken. 163. *Rex* v. *Benn*, 6 T. R. 198.

The court never grants a mandamus except it indisputably appears that the party to whom it is directed has, by law, power to do what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction (*n*).

Mandamus to ministerial officers.—The writ of mandamus lies also against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there be a penalty for their neglect (*o*). It will go to a gaoler to compel him to give up the body of a deceased prisoner for debt to his executors (*p*); to the trustees of a public charity, whose duty it is to furnish a churchwarden with the keys of a chest, enjoining them to deliver the keys (*q*); and to justices and clerks of the peace of a borough, to permit a rate-payer to inspect and take copies of a rate (*r*); also to a corporation, commanding them to permit a member of the body corporate to inspect the minute-books, by-laws, and records of the corporation, for the purpose of determining a matter in controversy between the corporation and the individual member, respecting the rights and privileges of the latter under the charter (*s*). But the court will not by mandamus interfere with the administration of the funds of charities (*t*), nor compel trustees of turnpike-roads to repair and keep in repair a turnpike-road (*u*); nor will a mandamus lie to the king's officer to compel him to deliver up property which he holds in his hands on behalf of the Crown; for a mandamus to the officer in such a case would be like a mandamus to the Crown, which the court cannot grant (*x*).

The court will by mandamus compel a public officer to deposit a public document, where a statute directs it to be deposited (*y*), and also to deliver up all books and papers of a public nature on his dismissal or retirement from office (post, pp. 970, 971).

It will also compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of the duty has passed; and if the public officer to whom belongs the performance of the duty has in the meantime quitted his office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform (*z*).

(*n*) *Rex* v. *Bishop of Ely*, 1 W. Bl. 58. *Rex* v. *Sillifant*, 4 Ad. & E. 361. *Reg.* v. *Lond. & North-West. Rail. Co.*, 6 Rail. Cas. 634. *Lee, ex parte*, 1 Ell. Bl. & Ell. 863.

(*o*) Com. Dig., MANDAMUS, 31 B. R. H. 261.

(*p*) *Reg.* v. *Fox*, 2 Q. B. 246.

(*q*) *Reg.* v. *Abrahams*, 4 Q. B. 161.

(*r*) *Rex* v. *Leicester Justices*, 4 B. & C. 891.

(*s*) *Burton, in re*, 31 Law J., Q. B. 62.

(*t*) *Rugby Charity, ex parte*, 9 D. & R. 214.

(*u*) *Reg.* v. *Oxford, &c. Roads*, 12 Ad. & E. 427.

(*x*) *Rex* v. *Commissioners of Customs*, 5 Ad. & E. 380.

(*y*) *Rex* v. *Payn*, 6 Ad. & E. 402.

(*z*) *Rochester (Mayor, &c. of)*, v. *Reg.*, 27 Law J., Q. B. 436, in error.

In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his superiors, or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus, and has left the parties to the ordinary remedies (*a*). Thus, in the ordinary case of disobedience, by surveyors, treasurers, and ministerial officers, of an order of sessions, the proper remedy is by indictment, or by removal of the order into the Court of Queen's Bench (*b*), and not by mandamus (*c*).

"The court," observes Lord Kenyon, C. J., "grants a mandamus to justices to make an order when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order: we might as well issue a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him" (*d*). But where a new ministerial officer is put forward as the nominal party, and a chartered company or corporation is in the background disputing the liability, and is the party really to be acted upon by the mandamus, the court will direct the writ to issue (*e*).

Mandamus to overseers to bury the dead body of a pauper.—It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep it unburied, nor do anything which prevents Christian burial; he cannot, therefore, cast it out, so as to expose the body, or offend the feelings, or endanger the health, of the living; and for the same reason he cannot carry it uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish-house, poor-house, or union-house, of the parish or union, the overseers of the parish, or the guardians of the union, may be compelled by mandamus to bury the body; but the court will not grant a mandamus to overseers to bury the body of a pauper who has died in a private house in the parish, or in a hospital not belonging to the parish authorities (*f*).

Mandamus to a rector to bury a corpse will be granted if it be shown that the rector has refused altogether to bury it; but there is no common-law right of burial in any particular part of the churchyard, and the court will not, by mandamus, enforce private rights of burial in any particular vault (*g*), or in any unusual or extraordinary manner (*h*).

Of the granting of the writ where there is another remedy.—It is no answer to an application for a mandamus to enforce the performance of

(*a*) Coleridge, J., *Rex* v. *Payn*, 6 Ad. & E. 401.
(*b*) 12 & 13 Vict. c. 45, s. 18.
(*c*) *Rex* v. *Bristow*, 6 T. R. 168. *Rex* v. *Jeyes*, 3 Ad. & E. 416. *Downton Overseers, ex parte*, 8 Ell. & Bl. 856.
(*d*) *Rex* v. *Bristow*, 6 T. R. 170.
(*e*) *Reg.* v. *Wood Ditton Surveyors, &c.*, 18 Law J., M. C. 218.
(*f*) *Reg.* v. *Stewart*, 12 Ad. & E. 773.
(*g*) *Blackmore, ex parte*, 1 B. & Ad. 122.
(*h*) *Rex* v. *Coleridge*, 2 B. & Ald. 809.

a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by mandamus (*i*). Where there is another remedy equally convenient, beneficial, and effectual, a mandamus will not be granted. "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus" (*k*).

It is no answer to an application for a mandamus to show that the defendant may be proceeded against by indictment (*l*), unless it is also shown that an indictment would be a more effectual and suitable course of proceeding (ante, p. 968).

The writ is never granted as a remedy for a mere private wrong where there is a clear cause of action, and compensation in damages would be an effectual or appropriate remedy (*m*).

A party applying for a mandamus must make out a legal right and a legal obligation (*n*), though if he show such legal right, and there be also a remedy in equity, that is no answer to an application for a mandamus; for when the court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law (*o*). Where a vestry-clerk moved for a mandamus to certain churchwardens to give up to him the custody of the vestry-book, which had been taken from him at a vestry-meeting, the court refused the application, as the vestry-clerk had no certain tenure of office, and was the mere servant of the vestry, and could be dismissed, and the book taken away from him at their will (*p*).

A legal obligation, which is the proper substratum of a mandamus, can only arise from common law, from statute, or from contract. An officer in the Queen's army, therefore, has no claim for a mandamus against the Paymaster of the Forces, to compel the payment of pay improperly withheld from him, whether he be a commander-in-chief of her Majesty's forces, or a lieutenant-colonel on half-pay, as the obligation, though binding in equity and conscience, wants the *vinculum juris*, and is not a legal obligation (*q*). But where public officers had actually received a specific sum of money for the use of the prosecutor, and wrote and informed him that he might receive it on application at their office,

(*i*) *Clarke* v. *Bishop of Sarum*, 2 Str. 1082.

(*k*) Hill, J., *Barlow, in re*, 30 Law J., Q. B., 271; 5 Law T. R., N. S. 289.

(*l*) *Rex* v. *Severn & Wye Rail. Co.*, 2 B. & Ald. 650. *Reg.* v. *Brist. Dock Co.*, 2 Q. B. 70. *Reg.* v. *Vict. Park Co.*, 1 Q. B. 291.

(*m*) Com. Dig., MANDAMUS, A. *Rex* v. *Clear*, 4 B. & C. 901. *Reg.* v. *Ponsford*, 1 D. & L. 116; 12 Law J., Q. B. 313.

(*n*) *Reg.* v. *Balby, &c. Turnpike Trust*, 22 Law J., Q. B., 164. *Reg.* v. *Abrahams*, 4 Q. B. 161. *Reg.* v. *Orton Trustees*, 14 Q. B. 146. *Bassett, ex parte*, 7 Ell. & Bl. 280.

(*o*) Buller, J., *Rex* v. *Stafford* (*Marquis of*), 3 T. R. 651.

(*p*) Anon. 2 Chitt. 255. *Rex* v. *Croydon*, 5 T. R. 714.

(*q*) *Napier, ex parte*, 18 Q. B. 695; 21 Law J., Q. B. 332.

and then refused to pay it except on conditions which they had no right to impose, the court granted a mandamus, enjoining them to pay the money (*r*). But the mere receipt of a lump sum of money by public officers, to be distributed or administered by them, does not render them liable to a mandamus for not paying the money (*s*).

Where an annuity has been granted by act of parliament, and charged upon the consolidated fund, and the annuity is in arrear, and payment can only be obtained by warrant of the Lords of the Treasury, and the duty of granting the warrant is imposed upon them by statute, and they refuse to fulfil this duty, and to do what is necessary to be done to enable the prosecutor to obtain payment, there is a case for a mandamus (*t*); but if the prosecutor fails in establishing a clear statutory duty, the court will decline to interfere (*u*). And as against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie (*v*).

And where the duty sought to be enforced is the payment of a sum of money, and an action of debt is maintainable for the money, and affords as convenient and effectual a remedy as a writ of mandamus, the court will leave the party to the ordinary remedy by action, and will refuse a mandamus (*x*).

Mandamus to compel the surrender of public documents.—The court has refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents (*y*); but the remedy by action is not an effectual remedy for the recovery of the documents themselves; and wherever a private individual, who has quitted office, keeps back public documents of which he obtained custody whilst acting in an official character or capacity, and by colour of his office, the court will by mandamus compel the production of the documents, and if private and public documents have been so mixed up together that they cannot be severed, the whole must be produced (*z*). Thus, a mandamus will be granted to a private individual who has previously served the office of town-clerk in a borough, directing him to deliver up records and books connected with the administration of public justice in the borough, which came into his custody as town-

(*r*) *Rex* v. *Treasury* (*Lords of*), 4 Ad. & E. 286.

(*s*) *Walmsley, ex parte*, 1 B. & S. 81; 4 Law T. R., N. S. 242.

(*t*) *Reg.* v. *Treasury* (*Lords of*), 16 Q. B. 361. *Reg.* v. *Ambergate, &c.*, 17 Q. B. 967.

(*u*) *Rex* v. *Treasury Lords*, 4 Ad. & E. 981.

(*v*) *Bode* (*Baron de*), *in re*, 6 Dowl. P. C. 792. *Hand, in re*, 4 Ad. & E. 984. *Smith, in re*, ib. 976. *Ricketts, ex parte*, ib. 999.

(*x*) *Reg.* v. *Hull & Selby Rail. Co.*, 6 Q. B. 70; 13 Law J., Q. B. 257. *Reg.* v. *Brist. & Exeter Rail. Co.*, 3 Rail. Cas. 777; ante, p. 969.

(*y*) *Reg.* v. *Hopkins*, 1 Q. B. 169.

(*z*) *Rex* v. *Payn*, 6 Ad. & E. 399.

clerk, and hand them over to his successor in the office (*a*); also to a retired overseer of the poor, to compel him to deliver over the parish books to the new overseer (*b*); also to a dismissed clerk of a chartered company, requiring him to deliver up to the company all books, papers, &c., which he had in his custody by virtue of being their clerk (*c*).

A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed, may be obtained on due proof of the wrongful dismissal (*d*). A public officer appointed for life, or during good behaviour, cannot lawfully be removed from his office for misconduct without being called upon to make, and being afforded an opportunity of making, his defence, for "Nullus liber homo disseisietur de libero tenemento suo nisi per legale judicium parium suorum vel per legem terræ" (*e*.) If he has committed felony, or a misdemeanour, he must be tried and convicted by a jury before the offence can work a forfeiture of his office, and if he has been guilty of misconduct in the discharge of his official duties, he must have been given an opportunity of answering the charge, or have been heard in his own defence before he can lawfully be removed. Where a vicar removed a parish-clerk for acts of misconduct alleged to have been committed in the vicar's own view, the court granted a mandamus to compel the vicar to restore the clerk to his office. For the vicar it was contended, that as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous, and that the law invested the vicar with the functions of accuser, witness, and judge, in respect of indecent conduct publicly exhibited in his presence; but the court held that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in which the accused should have an opportunity of being heard, and of explaining his behaviour. "The important principle that every man ought to be heard before he is condemned, so strenuously asserted by Lord Kenyon (*f*), is not excluded," observe the court, "because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions, while we think it indispensable, for the sake of the party charged, to the due execution of every judicial power" (*g*).

(*a*) *Nottingham Town Clerk's* case, 1 Sid. 31. *Rex* v. *Ingram*, 1 W. Bl. 49.
(*b*) *Rex* v. *Clapham*, 1 Wms. 305. *Reg.* v. *Fox*, 1 W. W. & H. 4.
(*c*) *Rex* v. *Wildman*, 2 Str. 879.
(*d*) *Rex* v. *Morpeth Ballivos*, 1 Str. 58.
(*e*) MAGNA CHARTA, c. 29.
(*f*) *Rex* v. *Gaskin*, 8 T. R. 209; Ld. Ellenborough, 1 Campb. 65.
(*g*) *Reg.* v. *Smith*, 5 Q. B. 623; 14 Law J., Q. B. 166. *Doe* v. *Gartham*, 1 Bing. 357. *Cooper* v. *Wandsworth Board, &c.*, 32 Law J., C. P. 186; 11 W. R. 446.

And although the officer, having been duly elected, has procured himself to be admitted to the office by means of fraudulent misrepresentation and deceit, he must be called upon to come in and defend himself before he can lawfully be removed (*h*). Where, however, the election itself was void *ab initio*, on the ground of fraud, so that the party has never become a member, his admission may, it seems, be cancelled without a hearing (*i*).

There seems to be a great deal of difference between a mandamus to admit, and a mandamus to restore, to a freehold office. The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a *primâ facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him (*k*).

How a freehold office may be forfeited and vacated.—If a man grant an office to another for term of his life, the freehold estate which the grantee hath in the office is upon condition in law that he shall well and faithfully do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and grant the office to another (*l*). There are, says Lord Coke, three causes of forfeiture, or seizure of offices: 1, by abuser; 2, non-user; 3, refusal (*m*). If the officer is removed by reason of the forfeiture of his freehold office, through breach of the implied trust upon which it was granted, that will be a removal "per legem terræ." If he is not so removed, he ought to be convicted, "per judicium parium suorum," of some public crime before he can lawfully be dispossessed of his freehold (*n*). And the crime must be of such a nature as to render the officer publicly infamous, and unfit to hold any public office; for if he has been convicted of an assault, or any other offence which does not carry such infamy with it, the conviction will be no ground of disfranchisement (*o*).

"There are," observes Lord Mansfield, "three sorts of offences for

(*h*) *Reg.* v. *Sadlers' Co.*, 32 Law J., Q. B., affirming the decision of the Queen's Bench; 30 Law J., Q. B. 186; and reversing that of the Exchequer Chamber.

(*i*) *Reg.* v. *Sadlers' Co.*, ut sup. *Reg.* v. *Gen. Council Med. &c.*, 30 Law J., Q. B. 201.

(*k*) *Rex* v. *Jotham*, 3 T. & R. 575.

(*l*) Litt. sec. 378. The grantee may be ousted "s'il non attend sur son office, s'il fait contrariant chose à son office, ou misfeseance de son office," 11 Ed. 4, fol. 1.

(*m*) *Earl of Shrewsbury's* case, 9 Rep. 46 b.

(*n*) *Bagg's* case, 11 Co. 99. *Harcourt* v. *Fox*, 1 Show. 431, 506; 4 Mod. 169.

(*o*) *Rex* v. *Richardson*, 1 Burr. 538; Buller's N. P., 7th edn. 206. *Reg.* v. *Clerk of Peace of Cumberland*, 11 Mod. 81; 1 Roll. Abr., OFFICE, 155. Cruise's Digest, FRANCHISE.

which an officer or corporator may be discharged: first, such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise; secondly, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office; thirdly, such as are of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law. For the first sort of offences there must be an indictment and conviction before removal; but in respect of the second class of offences, the party must be tried by the corporation (*p*). And there cannot, it seems, be any cause to disfranchise a member of a corporation unless it be for a thing done which tends to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof. Any mere personal offence of one member thereof affords no cause for disfranchisement (*q*). Mere misapplication of the money of the corporation is not a good ground for the disfranchisement of a corporator; the corporation must have an action for the money (*r*).

Offices held at will, or during the good pleasure, or at the discretion, of the parties appointing to them, may be taken away without any reason assigned, or any summons or hearing of the party removed (*s*). This is the case with the office of a vestry-clerk (*t*), clerk to justices (*u*), clerks and treasurers of guardians of the poor (*v*), and the minister of a dissenting congregation who is elected by the majority of the members of the congregation, and who may be removed by such majority, and be turned out of his house, premises, and chapel, if they are dissatisfied with his doctrines and religious teaching (*x*).

Where the charter by which a charity was founded conferred on the governors full power to appoint the schoolmaster, and to remove him and appoint another according to their sound discretion, and a schoolmaster was appointed and afterwards dismissed, it was held that the court could not interfere with the discretion of the governors, or review their reasons for the dismissal (*y*).

Visitatorial power excluding the proceeding by mandamus.—Where corporate offices are held in private or eleemosynary corporations, on the terms that if any dispute should arise respecting the right to the office, or the validity of a discharge, or amotion from it, such dispute should be

(*p*) *Rex* v. *Richardson*, 1 Burr. 537. *Rex* v. *Mayor of Liverpool*, 2 Burr. 733. *Reg.* v. *Baines*, 6 Mod. 192; 2 Salk. 680. *Reg.* v. *Clerk, &c. Cumberland*, 11 Mod. 81.

(*q*) *Earle's (Sir Thos.)* case, Carth. 176.

(*r*) *Rex* v. *Chalke*, 1 Ld. Raym. 225. *Rex* v. *Wilton (Mayor, &c.)*, 5 Mod. 257.

(*s*) *Rex* v. *Stratford (Mayor, &c.)*, 1 Lev. 291.

(*t*) *Rex* v. *Croydon (Churchwardens of)*, 5 T. R. 713.

(*u*) *Sandys, ex parte*, 4 B. & Ad. 863.

(*v*) *Rex* v. *St. Nicholas, &c.*, 4 M. & S. 324.

(*x*) *Doe* v. *Jones*, 10 B. & C. 718. *Doe* v. *McKaeg*, ib. 721.

(*y*) *Reg.* v. *Darlington School Governors*, 6 Q. B. 696, 715.

settled or determined by a visitor or judge whom the founder has nominated, the court will not interfere by mandamus (*z*). But one branch of a corporation has no visitatorial power over another. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the king exercises the power by his chancellor. In corporations established for the government of cities and towns, the king may be said to exercise the power by mandamus through the Court of Queen's Bench (*a*).

Mandamus to restore the name of a medical practitioner to the Medical Register.—By 21 & 22 Vict. c. 90, s. 29, it is enacted, that if any medical practitioner shall be convicted of any felony or misdemeanour, or shall, after due inquiry, be judged by the general council of medical education and registration to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register. The decisions of the council under this section, made after due inquiry, are final, and cannot be reviewed by the superior court. Where, therefore, the medical council, after communicating to a medical practitioner certain charges made against him of infamous conduct in his profession, and having heard and considered his answers and explanations, directed the registrar to remove his name from the medical register, the court refused a mandamus to restore him (*b*).

Mandamus to test the validity of an election.—The mere rejection of votes at an election of corporate officers furnishes no ground for interference by mandamus, where it does not appear that the election has been thereby vitiated. It must be shown that the rejection of the votes led to the declaration of a candidate as duly elected who would have failed if the votes had been received (*c*). The validity of an election by parishioners of churchwardens may, under certain circumstances, be tried by mandamus (*d*). And where it is the custom for the parishioners to elect one churchwarden, and for the rector to nominate the other, the validity of the rector's nomination may be tested by mandamus (*e*).

Mandamus to elect corporate and public officers.—A mandamus lies also to the inhabitants of a parish liable to contribute to the church-rate, directing them to meet together and elect churchwardens (*f*), but not to churchwardens to call a vestry to elect a sexton, where the office is full by the appointment of the rector, and there is a remedy by refusing the sexton his fees, or bringing an action if they are taken (*g*).

(*z*) *Reg.* v. *Dean & Chap. of Chester*, 15 Q. B. 513. *Reg.* v. *Dean and Chap. of Rochester*, 17 Q. B. 1.

(*a*) *Rex* v. *London* (*Mayor of*), 4 M. & R. 62.

(*b*) *Lamert, ex parte*, 3 N. R. (1863), 120.

(*c*) *Mawby, ex parte*, 3 Ell. & Bl. 718.

(*d*) *Rex* v. *Birmingham Rector*, 7 Ad. & E. 254.

(*e*) *Barlow, in re*, 30 Law J., Q. B. 271.

(*f*) *Rex* v. *Weir*, 2 B. & Ad. 197. *Reg.* v. *St. Stephens, &c.*, 14 Law J., Q. B. 34.

(*g*) *Rex* v. *Stoke Damerel*, 5 Ad. & E. 584.

Mandamus to enforce an appointment to a public or corporate office.—It is the duty, also, of the Court of Queen's Bench to see that the functions appertaining to public offices are discharged by persons duly elected to the office. When, therefore, a public office is vacant, and a party has been elected to serve the office, the court will by mandamus enforce the right to the office; but where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder, and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo warranto*, and not by mandamus (*h*). If, however, there is only a colourable election, it is void, and a mandamus to go to an election will be granted (*i*). And there are occasions where a *quo warranto* will lie, and yet the remedy by mandamus may be deemed a more appropriate remedy (*k*).

Wherever a party has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected to serve the office, and the corporation refuses to institute him in the office, a mandamus lies to compel them so to do (*l*); but the court will not interfere where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote (*m*).

The writ of mandamus lies also against a rector or a parson, to compel him to receive and swear in a person who has been duly appointed to the office of churchwarden, sexton, parish-clerk, &c. (*n*); to a dean and chapter, to admit a prebendary to his stall and voice (*o*); to the lord of a manor, to admit a copyholder to a copyhold estate (*p*), or to permit him to inspect the court-rolls of the manor (*q*); to the trustees of a meeting-house, to compel them to admit to the pulpit thereof a dissenting minister duly elected (*r*). But a mandamus does not lie to compel the admission of a party to any mere private appointment, situation, or employment (*s*), such as that of clerk or secretary to a joint-stock company (*t*), vestry-clerk or toll-gate keeper (*u*), nor to restore to an office a person who is admitted to have been rightly removed (*x*), or who is removable at will (*y*).

(*h*) *Rex* v. *Colchester* (*Mayor of*), 2 T. R. 259. *Reg.* v. *St. Martin's, &c.*, 20 Law J., Q. B. 423. *Darley* v. *The Queen*, 12 Cl. & Fin. 520. *Hill* v. *Reg.* 8 Moore, P. C. C. 139. *Rex* v. *Winchester* (*Mayor of*), 7 Ad. & E. 222. *Reg.* v. *Derby*, ib. 419.

(*i*) *Rex* v. *Cambridge*, 4 Burr. 2010. *Reg.* v. *Oxford* (*Mayor of*), 6 Ad. & E. 353. *Reg.* v. *Leeds* (*Mayor of*), 11 Ad. & E. 517.

(*k*) Lawrence, J., *Rex* v. *Bedford Level*, 6 East. 367.

(*l*) *Rex* v. *Cambridge University*, 1 W. Bl. 551. *Rex* v. *Windham*, 1 Cowp. 377.

(*m*) *Reg.* v. *Dolgelly Guard. &c.*, 8 Ad. & E. 564.

(*n*) *Barlow, in re*, 30 Law J., Q. B. 271; March. 101,

(*o*) *Rex* v. *Dean, &c. of Norwich*, 1 Str. 159. *Clarke* v. *Bishop of Sarum*, 2 ib. 1082.

(*p*) *Rex* v. *Hendon* (*Lord &c.*), 2 T. R. 484.

(*q*) *Rex* v. *Tower*, 4 M. & S. 162.

(*r*) *Rex* v. *Barker*, 3 Burr. 1265. *Rex* v. *Jotham*, 3 T. R. 577.

(*s*) *Ile's* case, 1 Ventr. 143.

(*t*) *White's* case, 6 Mod. 18.

(*u*) *Rex* v. *Croydon Churchward. &c.*, 5 T. R. 713.

(*x*) *Rex* v. *Mayor, &c. of Axbridge*, 2 Cowp. 523.

(*y*) *Le Roy* v. *Campion*, 1 Sid. 14.

The writ of mandamus will not lie to compel the institution of a clergyman to a presentative benefice, as the appropriate remedy by *quare impedit* is open to those who present him, and he has himself no legal right whatever (*z*).

Mandamus to chartered companies and corporations.—The writ of mandamus lies also against all chartered companies and corporations, to compel them to conform to the provisions of their charter or act of incorporation, and discharge the functions vested in them. Wherever a company, incorporated by royal charter or by act of parliament, has imposed upon it the duty of keeping a register, and inserting therein the names of the shareholders, the court will by mandamus compel the performance of the duty (*a*). The writ lies also against the directors of a chartered company, enjoining them to admit, or to swear in as a director of the company, a person who has been duly elected to the office (*b*); or to admit the prosecutor of the writ a member of the company (*c*); or to replace stock sold out and transferred on the authority of a forged signature (*d*). It is available, also, against the steward of a corporation, for the purpose of compelling him to produce the public books at corporate meetings (*e*); also against the master of a hospital incorporated for charitable purposes, for the purpose of compelling him to put the common seal of the corporation to an instrument of presentation (*f*); against the warden of a college, to compel him to affix the common seal of the college to an answer of the sub-warden, bursars, dean, and principal officers of the college, to a bill in Chancery (*g*).

The court will by mandamus entertain the question whether a corporation, not having affixed its seal, is bound to do so; but not the question whether, when they have affixed it, they were right in so doing. The writ is granted when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done (*h*).

The writ is available, also, for the purpose of enforcing performance of the duties imposed by charter, custom, or contract on the body corporate in favour of particular members thereof. Where there is a dispute and matter of controversy between the corporation on the one hand, and one of its members on the other, respecting the corporate rights and privileges of the latter, a mandamus may be obtained at his instance against the corporation, commanding them to allow him to inspect the corporate

(*z*) *Reg.* v. *Orton (Trustees of)*, 14 Q. B. 146.

(*a*) *Norris* v. *Irish Land Co.*, 8 Ell. & Bl. 525. *Swan* v. *North. Brit. Austral. Co.*, 31 Law J., Exch. 425.

(*b*) Anon. Str. 696.

(*b*) *Dacosta* v. *The Russia Co.*, 2 Str. 783. *Rex* v. *March*, 2 Burr. 1000. *Reg.* v. *Sadlers' Co.*, 1 Bail. Court. Cas. 183.

(*d*) *Mid. Rail. Co.* v. *Taylor*, 31 Law J., Ch. 336.

(*e*) *Borough of Calne's* case, 2 Str. 948.

(*f*) *Reg.* v. *Kendal*, 1 Q. B. 366. But see *Reg.* v. *Orton Trustees*, 14 Q. B. 146.

(*g*) *Rex* v. *Windham*, 1 Cowp. 377.

(*h*) *Nash, ex parte*, 15 Q. B. 95; 19 Law J., Q. B. 296.

records, by-laws, minute-books, and other documents relating to the matter in controversy, to see whether he can make out a case in his favour, and initiate proceedings against the corporation with a prospect of success (*i*). But the court will not grant a mandamus for a general inspection of all records, muniments, &c., but only of such as relate to the particular matter in controversy; for the members of a corporation have no right, on speculative grounds, to call for an examination of the books and muniments, to see if they can fish out of them some complaint or charge against the corporate body. It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is interested, and in respect of which the examination becomes necessary (*k*).

The writ goes also to a corporation or chartered company, to compel it to fulfil the duties it has contracted towards strangers, where there is no other suitable or effectual remedy. A judgment-creditor, therefore, of a trading corporation may obtain a mandamus enjoining the corporation to give him inspection of the register of shareholders, if he has no other or effectual means of obtaining such inspection (*l*).

There is no practical distinction between companies existing by statute and companies created by charter. A mandamus, therefore, lies against a company incorporated by statute, commanding them by the hand of their secretary to enter on their books, or to register, the probate of the will of a deceased shareholder (*m*); also transfers, or memorials of transfers, of shares (*n*).

But if the prosecutor of the writ of mandamus is not proceeding *bonâ fide* for the purpose of enforcing his rights as a shareholder, and has no interest himself as one of the public in the performance of the thing which he seeks to have done, he is not entitled to the writ (*o*). The court will not grant the writ at the instance of one of several partners in a trading corporation, who seeks merely to compel the directors to produce their accounts and divide profits, the Court of Chancery being the proper tribunal for that purpose (*p*).

Mandamus to make calls.—And where a public board or corporate body is clothed with certain defined statutory powers, and is authorised to enter into contracts, and has the power of creating, by calls on share-

(*i*) *Burton, in re*, 31 Law J., Q. B. 62.

(*k*) *Rex* v. *Merchant Taylors' Co.*, 2 B. & Ad. 115. *Rex* v. *Hostmen of Newcastle*, 2 Str. 1223.

(*l*) *Reg.* v. *Derb. &c. Rail. Co.*, 3 Ell. & Bl. 784.

(*m*) *Rex* v. *Worcester Canal Co.*, 1 M. & R. 520.

(*n*) *Reg.* v. *Lond. & Colcraine Rail. Co.*, 13 Q. B. 998. *Reg.* v. *Wing*, 17 ib. 645. *Reg.* v. *Gen. Cem. Co.*, 6 Ell. & Bl. 415. *Norris* v. *Ir. Land Co.*, 8 Ell. & Bl. 512. *Reg.* v. *Mid. Co. &c.*, 9 L. T. R., N. S. 151.

(*o*) *Reg.* v. *Liverpool, Manchester, &c.*, 16 Jur. 949. *Briggs, ex parte*, 28 Law J., Q. B. 272.

(*p*) *Rex* v. *Bank of England*, 2 B. & Ald. 622.

holders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors (*q*). But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits (*r*).

Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt, or a pecuniary obligation.—Whenever judgment has been recovered in an action against the clerk of a local board, or of commissioners or trustees, in respect of something done by such commissioners or trustees in the execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt. Under s. 89 of the Local Board of Health Act (11 & 12 Vict. c. 63), a local board of health may be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained against them (*s*). But the remedy is not available after the six months have expired (*t*). Wherever public officers have borrowed money upon the security of rates they are authorised to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money (*u*). If an act of parliament authorises parish officers, commissioners of public works or boards of health, to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses they incur upon rates they are authorised to impose, and contracts are made by them, and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordinary remedy by way of action is

(*q*) *Rex* v. *St. Cath. Dock Co.*, 4 B. & Ad. 360.

(*r*) *Reg.* v. *Victoria Park Co.*, 1 Q. B. 202.

(*s*) *Reg.* v. *Rotherham*, 8 Ell. & Bl. 906; 27 Law J., Q. B. 150.

(*t*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 Law J., Q. B. 17. In other cases, the plaintiff is not concluded by delay, *Ward* v. *Lowndes*, 17 C. B. 940. *Reg.* v. *Churchwardens, &c.*, 27 Law J., M. C. 215. *Bush* v. *Martin*, 12 W. R. 204.

(*u*) *Reg.* v. *Brancaster* (*Churchwardens*), 7 Ad. & E. 458.

not available, the court will, by mandamus, compel them to make a rate, and provide themselves with funds, and pay such expenses (*x*).

Mandamus to railway companies, corporate bodies, and local boards to make compensation for lands taken, or injuries inflicted upon private persons.—Whenever any public body, executing public works under statutory powers, is required by act of parliament to make compensation to all persons who may sustain injury from the exercise of the powers intrusted to it, and machinery is provided for ascertaining and determining the amount by arbitration, and the board refuses to make compensation or denies its liability, the court will, by mandamus, compel it to make compensation, and put the necessary machinery in motion for ascertaining and settling the amount (*y*); and it is no bar to the prosecutor's right to a mandamus that he has not claimed a specific sum, or taken steps to have the amount ascertained and settled pursuant to the act (*z*).

A mandamus will go also against railway companies who have given notice to a landowner under the compulsory powers intrusted to them, that they require to purchase his land, and are willing to treat, &c., to compel them to summon a jury and take the necessary steps for settling the amount of purchase-money and compensation (*a*). But commissioners acting on behalf of the public, and giving notice that lands are wanted for public purposes, may revoke the notice before it has been acted upon, and cannot be compelled by mandamus to take and pay for the land (*b*).

A mandamus will go to an arbitrator, commanding him to give compensation in respect of lands being injuriously affected by the formation of a railway, or the construction of public works, executed under statutory authority (*c*); and if, after a railway has been made, and compensation given, fresh damage has been sustained from the execution of the railway works, the question whether the railway company is bound to make compensation in respect of this subsequent damage may be determined on a claim for a mandamus (*d*).

Mandamus to boards of health to make compensation.—Where a mandamus was issued to a local board of health, enjoining them to make compensation to the prosecutor for damage sustained by him by reason of the exercise by the board of certain powers conferred upon them by the Public Health Act, and the defendants returned that they had not denied

(*x*) *Reg.* v. *Hurstbourne Tarrant, &c.*, 27 Law J., M. C. 214; Ell. Bl. & Ell. 246. *Reg.* v. *Norfolk Commissioners of Sewers*, 20 Law J., Q. B. 121. *Bogg* v. *Pearse*, 10 C. B. 542; 20 Law J., C. P. 99.

(*y*) *Rex* v. *Nottingham Old Water Works Co.*, 6 Ad. & E. 370.

(*z*) *Reg.* v. *Burslem Local Board, &c.*, 29 Law J., Q. B. 242; 28 ib. 345.

(*a*) *Reg.* v. *Birm. &c. Rail. Co.*, 15 Q. B. 647. *South Yorkshire, &c., in re*, 14 Jur. 1099.

(*b*) *Reg.* v. *Com. of Woods & Forests*, 15 Q. B. 774.

(*c*) *Reg.* v. *Rynd*, 9 L. T. R., N. S. 27.

(*d*) *Reg.* v. *Aire & Calder Nav. Co. Rex* v. *Leeds & Selby Rail. Co.*, ante, p. 668.

their liability to make compensation, but were ready to make it so soon as it had been duly ascertained, but that the prosecutor had taken no steps to have it ascertained, nor given the defendants notice of his claim, or of the cause or amount thereof, and had not appointed an arbitrator, or given notice of his intention to do so, pursuant to the statute, and the return was traversed generally, and on the trial it was found that the defendants had denied all liability, it was held that the prosecutor was entitled to a verdict on the whole return, and to a peremptory mandamus. "It is said," observes Williams, J., "that, looking at the provisions of the Public Health Act, 1848 (*e*), and construing them by analogy to those of the Lands Clauses Consolidation Act, the proper course would have been for the applicant himself to have taken steps pursuant to s. 144, and to have got the amount of the compensation fixed by means of the course there prescribed, and then to have brought his action to recover the amount, in which action the question of liability might have been decided; but that involves the necessity, in all cases where there is a doubt, whether the party be entitled to compensation, of an expensive inquiry in the first instance, which in the result may prove entirely futile, and we think the question of liability should be first settled by mandamus. Secondly, it is said that the applicant ought to have claimed a particular amount. We are of opinion that there is no necessity for taking such a step. It would not regulate the frame of the mandamus, or the future rights of the parties" (*f*).

Effect of lâches or delay in applying for the writ.—A party who is entitled to a mandamus to a public board, to compel the making of a rate for the payment of a debt, should apply to the court within a reasonable time after default made. And if there is a *primâ facie* case of *lâches* or delay, the onus is thrown on the applicant of showing that he has not been guilty of such negligence as disentitles him to his remedy (*g*).

The application for a mandamus to a court of quarter-sessions, to compel the hearing of an appeal, must be made in the term next after the hearing of the appeal has been refused, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court (*h*).

The proceedings upon a mandamus were first given by the statute of Anne (*i*), and are the creature of that act, but they have been further extended by later statutes (*k*). The first step to be taken by a party desirous of obtaining a mandamus, is to move the Court of Queen's Bench for a rule to show cause why the writ should not issue, or for a rule abso-

(*e*) 11 & 12 Vict. c. 63, s. 144.
(*f*) *Reg.* v. *Burslem, &c.*, ante, p. 979.
(*g*) *Reg.* v. *Hurstbourne Tarrant*, 27 Law J., M. C. 214. *Reg.* v. *Halifax Road Trustees*, 12 Q. B. 448.
(*h*) *Reg.* v. *Richmond (Recorder of)*, Ell. Bl. & Ell. 255.
(*i*) 9 Anne, c. 20, s. 2.
(*k*) 1 Wm. 4, c. 21, s. 3; 17 & 18 Vict. c. 125, s. 68; post, p. 988.

lute in the first instance (*l*). By the Common Law Procedure Act, 1854, s. 76, it is enacted, that upon application by motion for any writ in the Court of Queen's Bench, the rule may be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation; but time may be allowed to return it by the court, or a judge, with or without terms. It is further enacted, s. 75, that no writ of mandamus issued out of the Court of Queen's Bench shall be invalid by reason of the right of the prosecutor to proceed by action for mandamus under that statute (post, s. 2); also (s. 77), that the provisions of the Common Law Procedure Acts, 1852 & 1854, shall, so far as they are applicable, apply to the pleadings and proceedings upon a prerogative writ of mandamus (*m*).

Proceedings by mandamus in respect of corporate offices in boroughs have been expedited by 6 & 7 Vict. c. 89, s. 5, which enacts, that in all cases of intended application for a mandamus, to proceed to an election of corporate officers, or for a *quo warranto* against any person claiming to be a corporate officer, the party intending to make the application may give notice in writing, and deliver a copy of the affidavits, and cause may be shown in the first instance; and if no sufficient cause be shown, the rule may be made absolute, and a peremptory writ of mandamus issued, as therein provided.

Conditions precedent to the issue of the writ.—To entitle a party to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the party moving for the writ desires to enforce (*n*), and a refusal or withholding of compliance on the part of the defendant (*o*); but the objection that no sufficient demand and refusal appear must be taken before the merits are discussed (*p*).

Where a party applies for a mandamus to compel churchwardens to allow the applicant to inspect parish accounts, he must state some special reasons on public grounds for the desired inspection; his right as a parishioner being a mere private right, in respect of which a mandamus will not be granted (*q*).

Requisites of the writ.—If a writ of mandamus command the defendant to do more than he is under a legal obligation to perform, the writ is invalid, and will be quashed (*r*). And where a mandamus orders several

(*l*) Corner's Crown Practice (MANDAMUS).

(*m*) 17 & 18 Vict. c. 125.

(*n*) *Reg.* v. *Brist. & Ex. Rail. Co.*, 4 Q. B. 162; 12 Law J., Q. B., 106.

(*o*) *Rex* v. *Brecknock, &c. Canal Co.*, 3 Ad. & E. 222. *Reg.* v. *Trustees Cheadle Highway*, 7 Jur. 373. *Reg.* v. *Norwich & Brandon Rail. Co.*, 3 D. & L. 385.

(*p*) *Reg.* v. *East. Co. Rail. Co.*, 10 Ad. & E. 531.

(*q*) *Rex* v. *Clear*, 4 B. & C. 901; ante, p. 969. *Rex* v. *Smallpiece*, 2 Chitt. 288.

(*r*) *York & North Mid. Rail. Co.* v. *Milner*, 15 Law J., Q. B. 379. *Reg.* v. *Lond. & South-West. Rail. Co.*, 17 Law J., Q. B. 326. *Reg.* v. *Ledgard*, 1 Q. B. 623. *Reg.* v. *Caledonian Rail. Co.*, 16 Q. B. 19.

things to be done, and is bad in respect of one of the things commanded, it is bad *in toto* (*s*). If the writ omits a necessary fact, it cannot be cured by the return (*t*).

A writ of mandamus may be questioned by showing that the title set out does not warrant the mandatary part of the writ. If there is any discretion to be exercised as to the time when a thing is to be done, or if the time or mode of performance is conditional, or dependent upon contingency, a writ commanding the doing of the thing at once, without giving any discretion, or providing for the contingency, will be defective (*u*).

Where an act of parliament directs one or other of two things to be done, the party who is to do the act has the option of doing which thing he pleases. A writ of mandamus, therefore, founded on the statute, and failing to give the election, is invalid, unless it assigns some sufficient reason why the party is no longer to have his election (*x*). The writ may be very general in its terms, showing what ought to be done by the defendants, and what is required to be done by them, but the return to the writ must be particular and minute (*y*).

A writ of mandamus to a corporation or chartered company, to compel the payment of a sum of money, should show on the face of it that the remedy by way of action or distress, for the recovery of the money, is not available (*z*).

Parties to whom the writ is to be directed.—Writs of mandamus must be directed to those, and those only, who are to obey the writ. Therefore, "if the writ be directed to the coroner and sheriff, where it ought to be to one only, it is naught" (*a*). And so it is if it be directed to a corporation in a wrong name (*b*); but it may be directed either to the corporation in its corporate name, or to those who by the constitution of the corporation ought to do the act (*c*). A mandamus to compel the admission to customary or copyhold estates must be directed to the lord and steward jointly, and not to the steward alone, in order that the interests of the lord may be effectually protected (*d*). It is at the peril of the person who desires the writ to have it properly directed (*e*).

Service of the writ may be effected by delivery of a copy of the writ,

(*s*) *Reg.* v. *Tithe Com.*, 19 Law J., Q. B. 177.

(*t*) *Reg.* v. *S. E. R. Co.*, 17 Jur. 901.

(*u*) *Reg.* v. *St. Luke's, Chelsea*, 31 Law J., Q. B. 50.

(*x*) *Reg.* v. *S. E. Rail. Co.*, 20 Law J., Q. B. 428; 4 H. L. C. 478; 17 Jur. 901.

(*y*) *Reg.* v. *Southampton Port Commissioners*, 1 B. & S. 5; 30 Law J., Q. B. 244.

(*z*) *Rex* v. *Margate Pier Co.*, 3 B. & Ald. 224. *Reg.* v. *Hull & Selby Rail. Co.*, ante, p. 970.

(*a*) *Reg.* v. *Hereford (Mayor, &c. of)*, 2 Salk. 701.

(*b*) *Rex* v. *Ripon (Mayor of)*, ib. 433. *Rex* v. *Norwich (Mayor, &c.)*, Str. 55.

(*c*) *Rex* v. *Abingdon (Mayor, &c.)*, 1 Ld. Raym. 559.

(*d*) *Reg.* v. *Powell*, 1 Q. B. 360.

(*e*) *Rex* v. *Curghey*, 2 Burr. 782.

but the original writ ought to be shown to each party served at the time of the delivery of the copy (*f*).

Return to the writ.—The first writ of mandamus always concludes with a command of obedience, or cause to be shown to the contrary (*g*); and the statute 9 Anne, c. 20 (*h*), requires a return to be made to the first writ. The return is generally indorsed on the original writ, and professes to be the answer of the parties to whom the writ is directed, who humbly certify, and return to their sovereign lady, the Queen, at the time and place in the writ mentioned, either that they have done what by the said writ they are commanded to do, using generally the very words of the mandatary part of the writ (*i*), or, if they have not yielded strict or substantial obedience, setting forth the grounds and reasons for their disobedience, which reasons must be fully and carefully specified, and shown to be sufficient in law to excuse or justify such disobedience.

When the writ has been issued to a judge, magistrate, or judicial officer, commanding him to receive, hear, and determine the merits of an information or complaint which he has wrongfully refused to hear, it is a sufficient return that he has received, heard, and determined, or that he has received, heard, and dismissed, the information or complaint. The court cannot, as we have seen, interfere with the decision, however erroneous it may be (*k*).

The return, being matter of record, need not, when made by a corporation, be under the corporate seal (*l*).

It is not necessary, in order to support the return, that every part of it should be good, it is sufficient if enough appear to show a good justification, or a good legal reason, why the mandamus should not be obeyed (*m*). If, therefore, a return is good in part, and bad in part, the good part may be separated from that which is bad (*n*).

The return to a mandamus to restore a dismissed public officer to his office, must set out all the necessary facts precisely, to show that the party has been removed in a legal and proper manner, and for a legal cause; and where he has been discharged for misconduct, that he was previously heard in his own defence, or that he was summoned to answer the charge and made default, and that the charge was proved against him (*o*).

(*f*) *Reg.* v. *Birm. &c. Rail. Co.*, 1 Ell. & Bl. 293; 22 Law J., Q. B. 195. Corner's Crown Pr., p. 227.

(*g*) Corner's Crown Pr., MANDAMUS.

(*h*) Extended by 1 Wm. 4, c. 21, s. 3, to all writs of mandamus.

(*i*) Corner's Crown Pr., MANDAMUS, Appendix.

(*k*) *Reg.* v. *Mainwaring*, Ell. Bl. & Ell. 474; ante, pp. 625, 628.

(*l*) *Rex* v. *Exeter* (*Bishop, &c.*), 1 Ld. Raym. 223.

(*m*) *Rex* v. *York* (*Archbishop of*), 6 T. R. 493. *Rex* v. *Griffiths*, 5 B. & Ald. 735. *Rex* v. *London* (*Mayor, &c. of*), 3 B. & Ad. 268.

(*n*) *Reg.* v. *New Windsor* (*Mayor of*), 7 Q. B. 917. Com. Dig., MANDAMUS.

(*o*) *Rex* v. *Liverpool* (*Mayor of*), 2 Burr. 733. *Rex* v. *Faversham Fish. Co.*, 8 T. R. 352. *Rex* v. *Lyme Regis* (*Mayor, &c.*), 1 Doug. 149.

Return setting up inability or impossibility of performance — Expiration of statutory power. — A writ of mandamus supposes the required act to be possible, and to be obligatory when the writ issues. Generally speaking, the writ suggests facts showing the obligation and the possibility of fulfilling it, and a return pursuing this suggestion, and traversing it, is good. Where the alleged obligation is founded on public acts of parliament recited in the writ and return, and it appears that the statutory power has expired, the writ of mandamus is bad, and will be quashed (*p*).

Pleas to the return — Traverse of material allegations. — By 9 Anne, c. 20, s. 2, it is enacted, that every person prosecuting a writ of mandamus may plead to, or traverse, all or any of the material facts contained in the return, to which the person making the return shall reply, take issue, or demur, and such further proceedings shall be had for the determination thereof as might have been had if the person suing the writ had brought his action on the case for a false return ; and if any issue be joined on such proceedings, the person suing the writ may try the same as an issue joined in such action on the case would be tried ; and in case a verdict shall be found for the person suing the writ, or judgment be given for him upon demurrer, or by *nil dicit*, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in such action on the case, and a peremptory writ of mandamus shall be granted without delay for him for whom judgment shall be given, as might have been done if the return had been adjudged insufficient. And in case judgment shall be given for the person making the return, he shall recover his costs of suit. But it is provided (s. 3), that if any damages shall be recovered by virtue of that act against any persons making such return, they shall not be liable to be sued in any other action for making such return. And the courts are to allow (s. 3) to persons to whom any writ of mandamus may be directed, or to persons who shall sue or prosecute the same, such convenient time to make a return, plead, reply, rejoin, or demur, as shall seem just and reasonable. And the stat. 4 Anne, c. 16, for the amendment of the law, and all statutes of jeofails, are thereby (s. 7) extended to all writs of mandamus and proceedings thereon ; and by 1 Wm. 4, c. 21, s. 3, the several enactments contained in the statute of Anne relating to the return, and the proceedings on such return, and to the recovery of damages and costs, are extended to all writs of mandamus and the proceedings thereon (*s*).

When the real object of a proceeding by mandamus is the recovery or enforcement of a civil right, the mandamus is in effect a civil action.

(*p*) *Reg.* v. *Lond. & North-West. R. Co.*, 16 Q. B. 884. *Reg.* v. *Ambergate, &c.*, 1 Ell. & Bl. 381.

(*q*) *Reg.* v. *Fall*, 1 Q. B. 649, 659.

Several matters, therefore, may be pleaded to the return, and orders for the inspection of documents will be made as in any ordinary action (*r*).

Return by public officers and parties interested in such return — Statutory protection to certain public officers, to whom writs of mandamus are directed, is given by 1 Wm. 4, c. 21, s. 4, which recites that writs of mandamus other than such as relate to the offices and franchises mentioned in 9 Anne, c. 20 (ante, p. 984), are sometimes issued to officers and other persons commanding them to admit to offices, and perform other matters in respect whereof the persons to whom the writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices, and that it may be proper that such officers should in certain cases be protected against the payment of damages or costs; wherefore it is enacted, that it shall be lawful for the court to which application is made for a writ of mandamus (other than such as relate to the offices and franchises mentioned in the statute of Anne), to make rules and orders calling not only upon the person to whom the writ may be required to issue, but also upon every other person having or claiming any right or interest in or to the matter of the writ, to show cause against the issuing of the writ, and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance, after service thereof, to exercise such powers and authorities, and make such rules and orders as may be made under the Interpleader Act, 1 & 2 Wm. 4, c. 58 (ante, p. 379), for giving relief against adverse claims made upon persons having no interest in the subject of such claims (*s*); but it is provided, that the return to be made to the writ and issues joined in fact or law upon any traverse thereof, or upon any demurrer, shall be made and joined by, and in the name of, the person to whom the writ is directed; but the same may, if the court so direct, be expressed to be made and joined on behalf of such other person as may be mentioned in such rules; and, in that case, such other person may frame the return, and conduct the subsequent proceedings at his own expense; and, in such case, if any judgment shall be given for or against the party suing the writ, the judgment shall be given against or for the persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs, and enforcing the judgment, as the person to whom the writ has been directed would otherwise have had.

When the return is made on behalf of a third party under the authority of the statute, the proceedings are not to abate on the death, resignation, or removal from office of the person having made such return, but may be carried on in the name of such person; and if a peremptory

(*r*) *Reg.* v. *Ambergate, &c.*, 17 Q. B. 957. (*s*) See 1 & 2 Wm. 4, c. 58, s. 8.

writ is awarded, it may be directed to any successor in office or right to such person.

After a demurrer to a return to a mandamus by the party to whom the writ has been delivered, the court will, in the exercise of the powers of this statute, let in another party really interested in the matter to join in making an amended return (*t*); but the party who seeks to come in must satisfy the court, or a judge at chambers, that there is reason for his claim, and that he is acting *bonâ fide*, and is not merely seeking to raise frivolous objections (*u*).

Time for taking objections to the writ.—There are cases where it has been held that, after a return to a mandamus, the court will not allow the validity of the writ to be questioned; but on a concilium, where the whole record is set down for argument, the defendant has a right to object to the writ in matters of substance, as much as a defendant has a right to object to a declaration where the whole record is set out upon demurrer, or writ of error after plea in civil proceedings (*x*). The question whether the writ does, or does not, upon the face of it, disclose a good legal ground for the issue of it may be raised at any stage of the proceedings; and the court will, at any time before a peremptory writ of mandamus issues, examine whether the writ is so framed as to give them jurisdiction (*y*). But where the writ is good upon the face of it, and a return has been made, and an issue thereon tried, the court will not quash the writ on grounds which do not appear on the record, and which might have been shown against making the rule absolute (*z*).

Review of proceedings in mandamus by writ of error.—By 6 & 7 Vict. c. 67, s. 1, reciting that as writs of mandamus are issued by the Courts of Queen's Bench, and the courts of the counties palatine, and that it was expedient that parties should be enabled to have the judgments and decisions of those courts reviewed by a court of error, and that power should be given to the prosecutor of the writ to demur to the return, it is enacted, that whenever the person prosecuting a writ of mandamus wishes to object to the validity of the return, he shall do so by way of demurrer to the same, and thereupon the writ and return, and the demurrer, shall be filed of record, and proceedings taken as upon demurrer to pleadings in personal actions; and the courts shall thereupon adjudge either that the return is valid in law, or that it is not valid, or that the writ of mandamus is not valid; and if they adjudge that the writ is valid, but that the return is not valid, then they shall also by their judgment award that a peremptory writ of mandamus shall issue, which writ may be

(*t*) *Reg.* v. *Paynter*, 14 Law J., M. C. 182; 9 Jur. 626; 1 Wm. 4, c. 21, s. 4.

(*u*) *Reg.* v. *Cheek*, 9 Q. B. 947; 16 Law J., M. C. 65.

(*x*) *Reg* v. *Powell*, 1 Q. B. 360.

(*y*) *Clarke* v. *Leicester, &c. Canal Co.*, 6 Q. B. 902. *Rex* v. *Margate Pier Co.*, 3 B. & Ald. 224.

(*z*) *Reg.* v. *Stamford* (*Mayor of*), 6 Q. B. 441.

sued out within four days; and the courts are required by their judgment to award costs to be paid to the party in whose favour they decide.

And whenever any such judgment has been given, or whenever issue in fact or in law has been joined upon the pleadings, and judgment given thereon, any party to the record who thinks himself aggrieved by the judgment may sue out a writ of error to reverse it, and proceedings thereon are to be taken, and costs awarded, as in ordinary cases of writs of error upon judgments. Provision is made for the issue of a peremptory writ of mandamus in case of the reversal of the judgment of the court below; and it is declared that no action shall be prosecuted against any person for anything done in obedience to a peremptory writ of mandamus.

Damages and costs — Costs on trial of issues of fact. — Wherever a party traversing a return obtains a verdict, he is now, since the passing of the stat. 1 Wm. 4, c. 21, s. 3 (ante, p. 984), entitled to some damages and costs; and if, at the trial of any issue raised on a traverse of any material allegation contained in the return, the jury omit to find damages, the judge who tried the cause may order, from his recollection, the verdict to be entered on the postea for nominal damages, to enable the successful party to recover his costs (*a*).

The costs of the application for the writ, independently of the trial of issues of fact raised by traverse of the return, &c., are regulated by the statute 1 Wm. 4, c. 21, s. 6, which enacts, that in all cases of application for a writ of mandamus, the costs of the application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court; and the court is authorised to order and direct by whom and to whom the same shall be paid.

Judgment non obstante veredicto. — Where the issues raised are altogether upon immaterial points, and the return is virtually and substantially a good return, the court will give judgment for the defendant, notwithstanding the finding of the jury on those immaterial issues for the plaintiff (*b*).

Actions for a false return are maintainable by the party injured or aggrieved thereby (*c*), unless damages have been recovered by him, under the statute of Anne, against the person making the return, upon a traverse of the facts contained therein, and an issue thereupon raised under the statute (ante, p. 984). The action must be brought against the party or parties who caused the return to be made (*d*). It is not maintainable against one who voted against the false return, and was consequently no party to it (*e*).

(*a*) *Reg.* v. *Fall*, 1 Q. B. 652, 659; ante, p. 986, as to costs in error.

(*b*) *Reg.* v. *Darlington School Governors*, 6 Q. B. 719.

(*c*) *Green* v. *Pope*, 1 Ld. Raym. 125. *Vaughan* v. *Lewis*, Carth. 227.

(*d*) *Rex* v. *Ripon* (*Mayor of*), 1 Ld. Raym. 564.

(*e*) *R.* v. *Pilkington*, Carth. 172.

Information for a false return.— If the matter of the return concerns the public government, and no particular person is so concerned or interested as to be aggrieved or injured thereby, an information may be filed against the particular persons joining in and making the false return (*f*).

Attachment for disobedience of peremptory writ of mandamus. — Objections to the validity of a peremptory writ of mandamus may be taken on a motion for an attachment, and it may be shown that the writ either commands the defendant to do more than he is bound to do, or that he is enjoined to do it in some particular mode, where the law gives him an option or discretion in the mode of performance. No other return will be admitted to a peremptory writ of mandamus than a certificate of perfect obedience and due execution of the writ (*g*).

SECTION II.

OF THE CLAIM TO A WRIT OF MANDAMUS IN AN ACTION AT COMMON LAW.

Of the union of an action in respect of a private injury with an application for a mandamus.— By the Common Law Procedure Act, 17 & 18 Vict. c. 125, it is enacted (s. 68), that the plaintiff, in any action in any of the superior courts, except replevin and ejectment, may endorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. The declaration in such action (s. 69), is to set forth sufficient grounds upon which such claim is founded, and that the plaintiff is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected. The pleadings and other proceedings in any action in which a writ of mandamus is claimed (s. 70) are to be the same, as nearly as may be, and costs are to be recoverable by either party, as in an ordinary action for the recovery of damages. In case judgment is given for the plaintiff, that a mandamus do issue, the court in which such judgment is given may (s. 71), if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also issue a peremptory writ of mandamus to the defendant,

(*f*) *Surgeons' Company's* case, Salk. 374. *Rex* v. *Abingdon* (*Mayor of*), 2 Salk. 431.

(*g*) *Reg.* v. *Ledgard*, 1 Q. B. 616.

commanding him forthwith to perform the duty to be enforced. The writ need not recite (s. 72) the declaration or other proceedings, or the matter therein stated, but may simply command the performance of the duty, and may, in other respects, be in the form of an ordinary writ of execution, except that it must be directed to the party, and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, is to be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.

The writ of mandamus so issued is to have (s. 73) the same force and effect as a peremptory writ of mandamus issued out of the court of Queen's Bench, and, in case of disobedience, may be enforced by attachment. The court may (s. 74), upon application by the plaintiff, instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

We have seen that the prerogative writ of mandamus is never granted for the enforcement of a mere private duty, where there is a clear cause of action, and compensation in damages would be an effectual remedy (ante, p. 969). And it has been held that the same rule will prevail with regard to the action of mandamus; and that where the duty to be performed is nothing more than the ordinary duty springing out of a contract in respect of which an action for damages is the appropriate remedy, the action for a mandamus does not lie. A mandamus, therefore, cannot be claimed to make a debtor pay a mere private debt, in respect of which the ordinary remedy by action is available (*h*).

Actions in which a claim for a mandamus may be sustained.— Wherever, by charter or act of parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may in the same action claim a mandamus for the fulfilment of the duty. Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of shareholders had been established,

(*h*) *Bush* v. *Beavan*, 32 Law J., Exch. 54. *Benson* v. *Paul*, 6 Ell. & Bl. 273; 25 Law J., Q. B. 274.

in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register; averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for an action for a mandamus (*i*). It is a case also, as we have seen, where a prerogative writ would be granted independently of the statute (*k*).

So, where the plaintiff having set forth that the defendants were a joint-stock company, duly incorporated under the Joint-Stock Companies Act, and that the plaintiff was duly entered on the register of shareholders as a holder and proprietor of certain shares, numbered, &c., and that the defendant removed his name from the register, and refused, after demand, to restore it, &c., and claimed damages and a mandamus, it was held that the claim was properly made (*l*). But whenever a mandamus is claimed in an action brought for the recovery of a mere pecuniary demand, it must be shown on the face of the declaration that the demand arises in respect of something done in furtherance of the provisions of a royal charter, or in the execution of an act of parliament; that the charter or statute exempts the defendants from all personal liability in respect of the debt, or pecuniary demand, and imposes upon them the duty of paying it out of a public fund they are authorised to administer, or out of rates they are authorised to levy; that there are no discoverable assets in their hands upon which a levy can be made, and that the only remedy for the satisfaction of a judgment obtained against them is by mandamus, to compel the making of a rate, and the application of the money thereby collected in satisfaction and discharge of such judgment.

Where the plaintiff, in his declaration against the clerk of a local board of health, set forth that certain improvement commissioners appointed under a local act, contracted to pay him a certain sum for certain services towards carrying into effect the purposes of the act; that the services were rendered, but the commissioners neglected to pay, and that afterwards, by virtue of another act of parliament, the duties of the commissioners were transferred to the local board of health; and it was

(*i*) Ld. Campbell, *Norris* v. *Ir. Land Co.*, 8 Ell. & Bl. 512; 27 Law J., Q. B. 119, overruling *Rex* v. *London Ass. Co.*, 5 B. & Ald. 899. But a company is not bound to register a transfer not in accordance with the statutable form, *Reg.* v. *Gen. Cem. Co.*, 6 Ell. & Bl. 415; 25 Law J., Q. B. 342. *Copeland* v. *North-East. Rail. Co.*, 6 Ell. & Bl. 277.

(*k*) Ante, pp. 976, 977.

(*l*) *Swan* v. *Brit. Austr. Co.*, 7 H. & N. 604; 2 H. & C., in error. *Ward* v. *S. E. R. Co.*, 29 Law J., Q. B. 177.

enacted that all debts payable by the commissioners should be satisfied by the local board out of rates they were authorised to levy; and the declaration went on to show that the debt remained unpaid; that the plaintiffs were personally interested in the levying a rate for payment thereof; that they had demanded and been refused payment and a rate, and sustained damage; and they then claimed a mandamus; and the cause went to trial, and the damages were assessed, it was held that the plaintiff was entitled to the mandamus claimed. "The provisions of the Common Law Procedure Act," observes Hill, J., "now enable a plaintiff, in an action in which he might recover judgment, but could not have execution, and would have had to apply for a mandamus, to combine a claim for a mandamus with his action, so that if he succeeds, a mandamus issues as part of the judgment. In such a case, I think the amount of the debt for which the mandamus is ultimately to issue may be ascertained in the action" (*m*).

Commissioners, or the members of a local board, appointed annually for executing the powers of a local act of parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party, as we have seen, to be sued for services rendered them for purposes within the scope of the act (*n*). But for the statute, the commissioners who retain, or order the services to be rendered, would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the act is thrown upon the fund they are authorised to administer. An action to enforce payment of these debts must, as we have seen, be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be resorted to for its satisfaction, and not the private property of the commissioners (*o*). If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment-debt, and they neglect to provide themselves with funds, and make the payment, an action for damages may be brought upon the judgment, and a claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment-debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment-debt (*p*) as the bringing of a second action

(*m*) *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; 28 Law J., Q. B. 265; 29 ib. 40, in error.

(*n*) Ante, p. 673. *Bush* v. *Martin*, 9 L. T. R., N. S. Exch. 510.

(*o*) *Hall* v. *Taylor*, Ell. Bl. & Ell. 107; 27 Law J., Q. B. 311. *Kendall* v. *King*, 17 C. B. 483; ante, pp. 652–655.

(*p*) Ante, pp. 978, 979.

for a mandamus. If a second action is brought it must, in many cases, be commenced within six months of the recovery of the judgment (*q*); and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the *bonâ-fide* execution of the statutory powers intrusted to them, so as to exempt them, and their clerk or secretary, from personal liability (*r*); for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorised proceedings, upon the rates, and a mandamus cannot issue to compel them to do what they have no power or authority to do (*s*).

Actions in which a claim for a mandamus cannot be sustained.—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body acting in discharge of public duties, or in the exercise of statutory powers, and there is nothing to exclude the personal liability of the defendants, and to show that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained. Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners, for putting into execution a local improvement act, became indebted to the plaintiffs for certain salary, due to them for services rendered to the commissioners under the provisions of the act, upon the retainer and request of the commissioners, and also for work and labour, journeys and attendances, as solicitors for the commissioners upon their retainer, &c., and for fees &c., money paid, &c., and on an account stated, and that these debts were a charge upon any monies and funds which might be in the hands of the commissioners, if the commissioners had funds, and, if not, then upon a rate leviable under the statute; that the plaintiffs were personally interested, &c.; that they demanded and were refused payment, and sustained damage, &c., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt. "The mandamus in this case," observes Channel, B., "is to pay out of the rates, or to levy rates for the purpose; it is objected that the writ is bad from being in the alternative; but passing this by, both branches of the alternative assume

(*q*) *Burland* v. *Kingston, &c. Local Board*, ante, p. 978.

(*r*) *Southampton &c., Bridge Co.* v. *Local Board, Southampton*, ante, p. 653.

(*s*) *Duncan* v. *Findlater*, ante, p. 654. *Bush* v. *Beavan*, 32 Law J., Exch. 58.

and imply a legal duty when the writ of mandamus issued to pay these claims out of the rates, or levy rates for the purpose; and this without even alleging that the services were rendered to, or on the retainer or request of, the commissioners *as such*, or for business done in carrying out the purposes of the act. Assuming the services not to have been in execution of the powers of the act, then they would not be even payable out of the rates" (*t*).

The declaration in the action for a mandamus is to set forth, as we have seen, the grounds upon which the claim is founded, the personal interest of the plaintiff therein, the damage he sustains, or may sustain, the demand by him of the performance of the duty, and the defendant's refusal or neglect. When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown, as we have seen, that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The existence of the debt must be affirmed; the obligation of the board or public body to pay it, and, if necessary, to make a rate for the purpose; also the plaintiff's personal interest in the matter, the damage he sustains, and the demand and refusal. And any of these allegations may be traversed, and found either in favour of the plaintiff or the defendant. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus, to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action (*u*).

In an action for a mandamus against a railway company to replace the name of a shareholder on the register, from which it had wrongfully been removed, the declaration set forth that the company was an incorporated company, the capital stock whereof was divided into shares transferable by deed; that the plaintiff purchased and became the proprietor of certain shares, numbered, &c., and was duly entered on the register of shareholders as a shareholder, in respect of such shares; that the company wrongfully, and without his authority, removed his name from the register; that the plaintiff requested them to replace his name; that they refused

(*t*) *Bush* v. *Beavan*, 32 Law J., Exch. 60. Some of the passages in the judgment in this case do not appear to be reconcileable with the judgment of the Court of Queen's Bench, in narrowing the operation of ss. 69, 70, & 71, of the Common Law Procedure Act, 17 & 18 Vict. c. 125, ante, p. 988. *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; 28 Law J., Q. B. 265; ante, p. 991.

(*u*) *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; ante, p. 988.

so to do; that he was personally interested, &c., and sustained damage, whereupon he claimed a writ of mandamus commanding them, &c. (*x*).

The pleadings in the action are, as previously mentioned, to be the same, as near as may be, as in an ordinary action for the recovery of damages (ante, p. 988).

Orders for the rectification of the register of shareholders in joint-stock companies.—The statutes 19 & 20 Vict. c. 47, s. 25, and 19 & 20 Vict. c. 14, ss. 8, 9, enable any of the superior courts of law or equity to make orders for the rectification of the register of shareholders of registered joint-stock companies, on the application of persons entered, or omitted to be entered, on the register, and to decide on the title of the applicant to have his name entered or erased from the register; but when once a person has been put on the register, the company cannot erase his name therefrom, except at the instance of a party having a better title, or by shewing that the registration is a nullity, by reason of fraud, misrepresentation, or forgery (*y*).

(*x*) *Swan* v. *Brit. Austr. Co.*, 7 H. & N. 604; 2 H. & C. 1, in error.

(*y*) *Swan, ex parte*, 7 C. B., N. S. 400; 30 Law J., C. P. 113. Addison on Contracts, pp. 135–138, 5th edn.

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